A

Francis Hargrave

TREATISE

ON

RENTS.

By a late

Lord CHIEF BARON of his Majesty's Court of Exchequer.

Lord Chief Baron Gilbert.

In the SAVOY:

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PREFACE.

THE following Treatiſe on *Rents* was ſent from *Ireland*, together with a Hiſtory of the *Court of Exchequer*, by a Perſon of the higheſt Station in the Law; in order to their being publiſhed here, as Works equally curious and uſeful from the accurate and copious Knowlege they convey, as well in a ſpeculative as practical View. The greateſt Aſſurances were at the ſame time given, that they were written by the late *Lord Chief Baron Gilbert*: which, together with the Correſpondence there appears betwixt the Contents of them, and the Heads of a greater Work, which were

in his own Hand-writing, amongſt other curious Manuſcripts collected by a Gentleman of the Law, and lately ſold, leave not the leaſt Room to doubt his Lordſhip being the Author of them. But had there not been this Information with reſpect to their Production, the Works themſelves diſplay ſo much Learning and Experience, joined to great natural Abilities, as could not fail to raiſe the Author to great Eminence and Conſideration in the Law: nor could indeed ſo ample a Cognizance of the Matters treated of, eſpecially with regard to the Hiſtory of the Court of Exchequer, have fallen in the Way of any, but one thoroughly well verſed in the Buſineſs of that Court in a judicial Capacity.

As to what regards this Treatiſe in particular, little need be ſaid further in its Recommendation. There is no Part of the Law more extenſively uſeful and intereſting, than that which makes the Subject of it, and yet perhaps no Part in which thoſe Niceties and Diſtinctions, that are eſſential both to Rights and the Means of recovering them, are leſs underſtood, either doctrinally or practically. For the Teaching by the Citation of determined Caſes, the almoſt univerſal Method of writing on theſe Matters, is very ill ſuited to explain a Syſtem of Law dependant on the antient Policy of the Country, and the Changes which Alteration of Circumſtances have in the later Times made neceſſary in it, and which in Fact can be only fundamentally un-

derſtood by a juſt hiſtorical View of that Policy, and thoſe Changes: a Manner in which this Subject has never been hitherto treated of.

It may be objected, that this Work is inſufficient to the End propoſed, becauſe ſeveral Acts of Parliament, made ſince the Time it was written, have varied the Law with Relation to Rents: but on Conſideration this will be found to occaſion only a trivial Diminution of the Value of this Tract. Thoſe Acts of Parliament are but few, and moſtly confined to the Means of recovering Rents due, in common Caſes; they are alſo in general well known to Perſons concerned in Practice, or at the worſt eaſily recurred to; and therefore do not properly conſtitute a Part of thoſe Difficulties intended to

be

be removed by this Treatiſe: while the doctrinal Principles, and Points of common Law, on which, as well the Knowlege of the Rights themſelves, as of the Means of Security and Recovery of them depend, are little affected by later Acts of Parliament, and make the moſt abſtruſe, and far greateſt Part of what is neceſſary to be underſtood, by either thoſe who are in the Practice of the Law, or concerned in Conveyancing. Thoſe who ſeek to obtain a clear and diſtinct Knowlege of the Nature of Rents, and the Practice with regard to them, as founded on the Law of *England*, will not be diſappointed in the Aſſiſtance they may hope for from the Title of this Work. The learned and elaborate Author has ſearched for the Prin-

ciples in the original Policy and Uſages which gave Riſe to them. He has traced down the Changes in the Practice to near the preſent Time; deduced the Reaſons from thoſe obvious Alterations of Circumſtances which occaſioned them; and conveyed the whole in ſo intelligible and comprehenſive a Manner, as can ſcarcely fail to give ſuch a juſt Notion of this Subject, either with reſpect to Doctrine or Practice, as will leave little neceſſary to thoſe who make themſelves Maſters of what he has furniſhed: and the Part which may be wanting to complete the Knowlege of what relates to Rents, *viz.* the Variation made by the *later Acts of Parliament*, is ſo much in the Reach of every one as renders the Deficience of little Conſequence.

Of

For the Divisions of this Treatise, see page 7.

Of Rents.

ALL Property, by our Law, is presumed to have been originally in the Crown; and the King portioned it out in large Districts to the great Men that had deserved well of him in the Wars, and were able to advise him in Time of Peace. This was the Nature of their Tenure; and these were all the Services the King expected in Return for such Concessions. But these large Districts or Countries would have been but of little Use, either to the Lords, or to the Public, if they had continued in their own hands: In such a Case, they must, in the midst of their large Territories, have wanted almost the Necessaries of Life; and the Public that Strength and Security, which Land well peopled and cultivated produces and yields. From hence it became necessary to subdivide those Territories; and the Division must neces-

 sarily

The Origin of Tenures by Knight's Service, and in Socage.

Lit. Sect. 119.

farily have been made among two Sorts of Men, to anſwer the ſeveral Neceſſities of the Lord and the Public;— The *Military Men*, to attend the Lord in the Field, and venture their Lives for their Country;— And the *Socmen*, to plow the Demeſnes which the Lord kept in his own Hands for the Support of his own Table, or to make an annual Return of Corn and other Proviſions for that Uſe and Purpoſe: And hence, by the Way, the Lands which the Socmen held were called *Farms*, from the *Saxon* Word *Feorm*, which ſignifies Proviſions.

Ibidem.

Theſe corporal Services, as Money multiplied and Trade increaſed, were changed into Money by the Conſent of the Tenants, and the Deſire of the Lords; and, as the military Tenure began to decline, they admitted of Compoſitions from the feudal Tenant for not attending his Lord in the Field, and thoſe Compoſitions were aſcertained by Parliament after the War was over, which was called *Eſcuage*: This Change of the Services ſeems to have been for the Eaſe and Advantage of the Lords,

Eſcuage what, and whence it aroſe.

becauſe

becauſe they were no longer obliged to carry their own Proviſions to the Camp, when they had Money from their Tenants, which in every Place would ſufficiently provide them with all the Neceſſaries of Life.

Diſtreſs the Remedy for the Recovery of Rent.

The Remedy for the Recovery of Rent is by Way of *Diſtreſs*, which ſeems to have come over to us from the Civil Law: for anciently, in the feudal Law, the not paying Attendance on the Lords Courts, or not doing the feudal Service, was puniſhed with the Forfeiture of the Eſtate; ſo is *Vigellius*, in the Title *Cauſæ ex quibus Feudum amittitur: viz.* "Si Vaſſalus Domino non ſervat, fidelitatemq; ei non præſtet; "ſi Vaſſalus, a Domino ejus vocatus, "non venerit; ſi pactum feudi non "ſervietur:" But theſe *feudal Forfeitures* were afterwards turned into *Diſtreſſes*, according to the pignorary Method of the Civil Law; that is, the Land that is ſet out to the Tenant is *hypothecated*, or as a Pledge in his Hands, to anſwer the Rent agreed to be paid to the Landlord; and the whole Profits ariſing from the Land, are liable

Vigellius 257, 271, 326.

Origin of diſtreſs.

Bacon on Government.

to the Lord's Seizure, for the Payment and Satisfaction of it.

The general Nature of *Homage* and *Fealty* as a Security for Performance of Services.

Beſides this, the Lord had another Security by the feudal Law for the faithful Performance of his Services: and that was, the ſolemn Engagement made by the Tenant upon his firſt entering into the Feud, by the doing *Homage*, and taking the Oath of *Fealty*; by which the Tenant ſolemnly ſwore and undertook, to bear Faith to him for the Lands which he held, and lawfully to do the Cuſtoms and Services which he ought to do at the Terms aſſigned him: from hence came that Connection between the Lord and Tenant, in the feudal Law, that Dependance and Attendance of the Tenant in all the Circumſtances of Life and Articles of Danger; and, in Return of that Service and Fidelity, the utmoſt Protection the Lord could give him: "Debet quidem "tenens manus ſuas utraſq' ponere in- "ter manus utraſq' Domini ſui; per "quod ſignificatur, ex parte Domini, "*Protectio*, *Defenſio*, et *Warrantia*; "et ex parte tenentis, *Reverentia* et "*Subjectio*."

Bracton, fol. 8.
Co. Lit. 65. a.

This

This Oath of *Fealty* or Fidelity was, we ſee, taken by the Tenant on Account of the Lands holden from the Lord; for ſo ſays the Tenant,—"*That* "*he will be faithful to the Lord for* "*the Lands which he holds*;"—and therefore this Engagement muſt ſubſiſt while the Tenure between the Lord and Tenant remains: And it was looked upon to be ſo ſacred an Obligation, and ſo neceſſary to be punctually obſerved, that originally, as we have obſerved, the Breach of it was attended with no leſs a Penalty than the Forfeiture of the *Feud* itſelf; and afterwards, when the Rigour of that Law came to be mitigated, with a Seizure of every thing that was found on the Land: Now the Diſtreſs being ſubſtituted inſtead of the Seizure of the *Feud*, we may eaſily account, why the Power of Diſtraining always attended the *Fealty*, or, as the Law Books term it, was inſeparably incident to it; becauſe the Power of Seizure could only belong to him in whoſe *Homage* the Tenant was, and to whom the Lands muſt return when the feudal Donation to the Tenant

The Oath of Fealty taken, on Account of the Lands held of the Lord;

and the Penalty for the Breach of it, the Forfeiture of the Land.

The Diſtreſs ſubſtituted inſtead of the Seizure of the Feud.

nant was ſpent; for it had been unreaſonable and abſurd, that the Tenant ſhould forfeit his Land for not paying a Service to a Perſon to whom he never obliged himſelf by any Oath or Engagement: and hence it is, that if the Lord upon the Donation had reſerved to himſelf any Gable or Rent, and had afterwards granted the Rent to a Stranger, tho' the Tenant had attorned, or conſented to the Grant, yet the Stranger could not diſtrain for the Rent; for as the Power of Seizure, ſo the Diſtreſs that was ſubſtituted in its Place, belong only to him of whom the Lands were held, and in whom the Right of *Reverter* was when the feudal Donation was ſpent; and therefore, the Stranger who could pretend no ſuch Right from the Grant, could have no Power of ſeizing the *Feud* for the Nonpayment of Rent, nor conſequently of diſtraining, becauſe then the Land would be liable to two different Seizures at different Times.

The Reaſon why a Stranger, Grantee of a Rent, could not diſtrain for it.

Co. Lit. 143. So it was upon leſſer Donations: As if a Leaſe had been made for Life, reſerving

ſerving Rent, and the Leſſor grants the Rent, the Grantee has no Remedy for the Recovery of it, for the former Reaſon: but if the Reverſion itſelf had been granted to a Stranger, the whole Services incident to it had paſt; and the Grantee, after Attornment, might well diſtrain, becauſe the Tenure muſt neceſſarily be of him to whom the Lands muſt return when the feudal Donation is ſpent: and the Tenant muſt owe his Fidelity to him whoſe Tenant he is, becauſe it were contradictory, to make him bear Faith for the ſame Land to different Perſons; therefore the Obligation of his firſt Oath of Fidelity muſt ceaſe, ſince he no longer holds any Land of him to whom he made it. But theſe Things will be conſidered more at large in treating of Rents under the following Diviſion:

Grantee of a Rent reſerved on Leaſe for Life could not diſtrain.

Secus, if the Reverſion had been granted to him.

I. What a *Rent Service* is; and the ſeveral Sorts of Rents. *p. 9.*

General Diſpoſition of the Work.

II. Out of what Things *Rents* may iſſue; and upon what Conveyances they may be reſerved. *p. 20.*

III. By what *Words* a Rent may be reſerved or created: How *ſeveral* Rents may be reſerved in one Deed: And of the Days of Payment in Law. *p.* 30.

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V. The *Remedies* for the Recovery of Rent: and in what Caſes a Demand is neceſſary; and at what Place and Time it muſt be made. *p.* 73.

VI. What Acts of the Leſſor or Leſſee amount to a *Diſcharge* of the Rent: and herein of the *Eviction* of the Land; the *Suſpenſion*, *Extinguiſhment*, and *Apportionment* of the Rent. *p.* 145.

I. What a RENT SERVICE is; and the ſeveral SORTS of RENTS.

It is an annual Return made by the Tenant, either in Labour, Money, or Proviſions, in Retribution for the Land that paſſes: This is properly a Rent Service; and is called ſo, becauſe the antient Retribution was made by the corporeal Service of the Tenant, in plowing his Lord's Demeſnes; and at this Day, the Tenant does the corporeal Service of *Fealty*.

1 *Vent.* 161. *Co. Lit.* 142. a. *What a Rent Service is.*

RENT SERVICE is two-fold, either { *expreſſed* in the Contract, or raiſed by *Implication* in Law.

The ſeveral Kinds of Rent Service.

When the Services are *expreſſed* in the Contract, the *Quantum* muſt be either certainly mentioned, or be ſuch, as by Reference to ſomething elſe may be reduced to a Certainty; and therefore, *Littleton* deſcribes a RENT SERVICE to be, " *Where the Tenant holdeth his* " *Land of his Lord by Fealty and* Cer- " tain *Rent, or by Homage, Fealty,* " *and* Certain *Rent, or by other Ser-* *vices*

Services expreſſed. *Lit.* Sect. 213.

Co. Lit. 96. a. 142. a.

" *vices and* Certain *Rent:*" And the Reaſon is this; becauſe if the Lord's Demands be uncertain, it is impoſſible to give him an *adequate* Compenſation for them: for whether the Service conſiſts in the Labour of the Tenant, or in Gable or Rent, the Lord cannot, upon his *Avowry*, recover Damages for the non-performance or non-payment, when the Jury cannot determine what Injury he has ſuſtained. And hence it is, that the Lord cannot diſtrain his Tenant in *Frankalmoigne*, for the Duty of ſuch Tenant being to make Oriſons, ſay Prayers and Maſſes, and perform other divine Services for the Soul of the Feoffor, but the Number of them being not expreſſed, the Service is altogether incertain; and therefore the Remedy is before the Ordinary, who may inflict eccleſiaſtical Cenſures for ſuch Omiſſion.

Ib. Sect. 135. 136.

Co. Lit. 96. a. But if the Tenant holds from his Lord, *to ſhear all his Sheep feeding in ſuch a Manor*, this is certain enough; becauſe it is eaſy to compute the Number within the Precincts of the Manor, and conſequently, what Expence the Lord is at in employing other Hands at that

that Work, and what Damages he has ſuſtained by the Omiſſion of his Tenant.

SERVICES IMPLIED, *are ſuch as the Law obliges the Tenant to perform when there are none contracted for in the Grant*; and thoſe are more or leſs, according to the Duration of the Gift. Thus at common Law, before the Statute of *Quia Emptores Terrarum*, if the Tenant made a Feoffment in Fee, without any Reſervation of Services, the Feoffee held by the Services by which the Feoffor held over; becauſe the Services, being an Incumbrance on the Land, which the Tenant could not diſcharge without his Lord's Conſent, muſt follow the Land in whoſeſoever Hands it comes; and this Conſtruction was the more reaſonable, becauſe when the Strength and Safety of the Nation depended upon a due and punctual Performance of the Services of the military Tenure, it muſt have weakened the Strength of the Nation, to have ſuffered any Man, by an unwary Grant, to diſcharge any Proportion of Land from the *Feudal* Service for ever.

Services implied.

Before the Stat. *Quia Emptores*, on a Feoffment without Reſervation of Services, Feoffee held by the ſame Services by which the Feoffor held over.

So

Co. Lit. 23. a. *Lit.* Sect. 19.

After the Stat. *de Donis*, Tenant in Tail to do the ſame Services to the Donor, as the Donor to the Lord.

So when after the Statute *de Donis* the feudal Right of *Reverter* was turned into a *Reverſion* in the Feoffor, the Law, for the former Reaſons, obliged the Tenant in Tail to do the ſame Services to the Donor, which he was obliged to by his ſuperior Lord; becauſe this was an Eſtate of Inheritance, which poſſibly might have continued for ever, and therefore might be attended with the ſame Inconvenience to the Public, if the Law did not create the uſual Services where there were none reſerved, and oblige the Donee to perform the ſame which the Donor is anſwerable for to his Lord *Paramount*.

Co. Lit. 23. a. c.

Where Tenant in Tail ſhall hold by diſtinct Tenures and Services.

Hence it is; that if *A.* ſeized of two Acres, one holden of *B.* by Knights Service, and 12 *d.* Rent, and the other Acre of *C.* in Socage, and 1 *d.* Rent, makes a Gift in Tail of both Acres, without any Reſervation; though the Donor has but one Reverſion, yet the Donee holds by two diſtinct Tenures, and different Services; and, purſuant to the Tenure and the Services, the Avowry of the Donor muſt be ſeveral, becauſe

becauſe the Donee muſt hold as the Donor held over.

There are theſe *Exceptions* out of this Rule; *Exceptions out of the foregoing Rule.*

Firſt, That if Tenant by *Grand Serjeanty* maketh a Gift in Tail, without any Reſervation, the Donee ſhall not hold by *Grand Serjeanty*; becauſe the Tenure is always of the *Perſon* of the King, and the Services of it are always performed to him in *Perſon*; but the Donee ſhall hold by *Knights* Service, becauſe that is the Service that comes the next to *Grand Serjeanty*. *Co. Lit.* 23. a.

Secondly, If the Tenant makes a Gift in *Frank-Marriage*, the Donees ſhall not be obliged to perform the Services which the Donor held by; for they ſhall hold by *Fealty* only, until the fourth Degree be paſſed.

But the Law did not make the Conſtruction on *Leaſes for Lives* or *Years*; for if the Leſſor made no Reſervation, *Ib.* a.

the

No implied Reſervation on Leaſes for Lives or Years, except Fealty.

the Law implied none, except *Fealty*, which every Tenant that has a determinate Intereſt muſt do; becauſe it is neceſſary that there ſhould be ſome Manifeſtation of Tenure, ſince all Lands muſt be held of ſomebody: and the Reaſon why the Law raiſed no other Service on theſe Gifts was; becauſe they, being of a ſhort Duration, could not be attended with the Inconveniencies of the former: for beſides that the Life of a Man is ſhort and uncertain, and that Terms for Years at firſt were but very ſhort, the Inconvenience of ſuch free Grants was ſtill the leſs; becauſe the Leſſor himſelf was ſtill anſwerable for the Services to his Lord; and therefore, ſince his Life was as good as the Leſſee's, there was at leaſt but a diſtant Proſpect of any public Miſchief from ſuch free Gifts.

2 *Inſt.* 505. Since the Stat. no Rent Service can be reſerved to the Grantor on a Feoffment, *&c.* Remainder in Fee.

But ſince the Statute of *Quia Emptores Terrarum*, if a Man makes a Feoffment in Fee, or a Leaſe for Life, or Gift in Tail, Remainder over in Fee, the Feoffee ſhall hold of the ſuperior Lord, by the ſame Services which the Feoffor or Donor held by; becauſe by that

that Act, the Tenure upon ſuch Donations muſt be of the capital Lord, and not of the Feoffor; wherefore upon ſuch Grants there can be no Rent *Service* reſerved at this Day to the Feoffor; becauſe the Feoffee is not obliged to ſwear *Fealty* to him, inaſmuch as he is not in his *Homage* by the Infeudation, and conſequently not obliged to do any Services to him for Lands which he holds from the capital Lord. But ſince the Statute, if a Man makes a Leaſe for Life, or Gift in Tail, ſaving the Reverſion to himſelf, with a Reſervation of Rent or other Services, this is a Rent *Service*, for which the Law gives the Donor or Leſſor a Remedy by *Diſtreſs*, as before the Statute; for neither the Leſſee or Donee is *Feoffatus* within that Act; becauſe there is a Reverſion in the Donor ſufficient to ſupport the Tenure of him. *Lit. Sect.* 214.

Rent Service may be diſtrained for.

Therefore in the Caſe of a Feoffment in Fee, or a Leaſe for Life, the Remainder in Fee, if the Feoffor reſerves a Rent, ſuch Rent is *Seck*, becauſe it is unprofitable to the Feoffee, he having no Remedy for the Recovery of it. *Ib.* 217, 218.

A *Rent-Seck*, what.

The Reaſon whereof is, becauſe the Land out of which the Rent is reſerved is not held by the Feoffor, and conſequently the Feoffee is not obliged to take the Oath of Fealty to him for Lands which are held of another; and where there was no *Fealty* due, there could be no *Seizure*, by the old Law, for Nonperformance of the Services, and conſequently no *Diſtreſs* without a particular Proviſion of the Parties: Wherefore in ſuch Deeds of Feoffments, if a Rent be reſerved, there muſt be a Clauſe of *Diſtreſs* inſerted to make the Reſervation of any Benefit to the Feoffor, and then it is called a Rent *Charge*, becauſe the Land is charged with a Diſtreſs for the Nonpayment of it.

Rent Charge what, and how created.

Co. Lit. 143. (b). 2 Roll. Ab. 449.

It ſeems to have been a Doubt, whether ſuch Reſervations were good in a Deed *Poll*, becauſe that is the ſole Act of the Feoffor, and the Words of the Reſervation proceed intirely from him; whereas in an *Indenture*, every Clauſe is as much the Act or Words of the Feoffee as the Feoffor. But it is now held, that Reſervation is good in a Deed *Poll*, becauſe whoever claims an Eſtate under any

Reſervation of a Rent charge by Deed *Poll* is good.

any Deed ought, in Reaſon and Equity, to be obliged to take it under the Terms expreſſed in the Deed.

Another Way of creating a Rent *Charge* is thus; The Tenant grants a yearly Rent out of his Lands to another for Life in Fee or in Tail, with a Clauſe of Diſtreſs; And this ſeems the moſt ancient Way of creating them, for it is but reaſonable to ſuppoſe, that when the abſolute Property of the *Feud* came to be eſtabliſhed in the Feudiary, this Method was ſoon taken up to provide for his younger Children, or anſwer his other extraordinary Occaſions; and the whole Bulk of the Eſtate, notwithſtanding ſuch Grants, deſcended to the Heir intire, to ſupport the Dignity of the Family: And there was this further Conveniency, that theſe Grants might be made without the Conſent of the Lord of whom the Land was holden, becauſe there was no Stranger introduced into the *Feud.* Whereas by the feudal Law, the Tenant could not make a Diſpoſition of any part of the *Feud* without the Lord's Licence: but tho' upon theſe Accounts, theſe Grants *Lit. Sect.* 218.

might have been frequent and prevailed much, yet the Grantee could have no Remedy by *Diſtreſs*, without ſuch Remedy had been particularly provided in the Deed of Grant; becauſe there could be no Forfeiture of the *Feud* by the old Law for Nonpayment of this Sort of Rent; for that were to admit a Stranger into the *Feud* without the Conſent of the Lord: and therefore the *Diſtreſs*, which was ſubſtituted in the Room of the Forfeiture, could not be derived to the Grantee from the Nature of the Grant it ſelf: and this Conſtruction on the Grant the rather obtained, becauſe ſuch Grants were againſt the Policy of the feudal Law; ſince they were ſo far from producing any Strength or Safety to the Public, that they really leſſened and impaired it: in as much as the feudal Tenant who made the Grant was the leſs able to perform the Duties of the military Tenure to his Lord, and muſt come worſe provided and equipt into the Field, when ſo much of the annual Profits were annually deveſted to anſwer ſuch Grants.

A Rent

A Rent granted *for Equality of Partition* by one Co-parcener to another is good, but this can be no Rent *Service*, becauſe there is no Tenure of the Parcener to whom it is paid, nor does the Co-parcener who pays it do *Fealty* to the other for the Lands out of which it iſſues: And it were unreaſonable to conſtrue it a Rent *Seck*, becauſe the Co-parcener has really parted with a Share of her Inheritance in *Lieu* of it: and ſince Co-parceners are compellable by Law to make Partition, and ſome Inheritances cannot commodiouſly be divided without Injury to the Eſtate, to conſtrue ſuch a Rent a Rent *Seck* were to obſtruct Partitions, for no Parcener would look upon ſuch Rent as an Equivalent for any Part of her Eſtate, if ſhe had no Remedy for the Recovery of it: wherefore the Law has conſtrued ſuch Rent a Rent *Charge of common Right*; that is, the Law, to encourage ſuch Partitions, has given a *Diſtreſs* for Recovery of it, on this Ground of Reaſon, becauſe the Parcener has given a valuable Recompence in Conſideration of it.

Rent granted for Equality of Partition. *Lit. Sect.* 251, 252.

A Co-parcener may diſtrain for Rent granted for Equality of Partition; and this is conſtrued to be a Rent-charge of common Right.

Rent in Lieu of Dower. Co. Lit. 169. A Widow may diſtrain for a Rent granted to her in Lieu of Dower.

So, and for the ſame Reaſon, it is in Caſe of a Rent granted to a Widow out of Lands whereof ſhe is *Dowable*, in Lieu of her Dower; becauſe there are ſome Things whereof a Woman is dowable that in their Natures are *indiviſable*; and therefore, to prevent Brangles in ſuch Caſes, and becauſe the Widow has really given a valuable Compenſation for the Rent, the Law gives her a Remedy for Recovery of it by Way of *Diſtreſs*,—the like Law of a Rent granted in Lieu of Lands upon an *Exchange*.

Rent granted in Lieu of Lands in Exchange.

II. *Out of what Things Rents may* ISSUE; *and on what* CONVEYANCES *they may be reſerved.*

Regula. *Out of what Things a Rent may iſſue.* Co. Lit. 47. a. 142. a. 2 Roll. Ab. 446. Rent cannot iſſue out of any incorporeal Inheri-

No Rent can iſſue out of any Incorporeal *Inheritance which lies in* Grant: Becauſe they are ſuch Things in their Nature as a Man can never recur to for a *Diſtreſs*: For Inſtance, if I have a Right of Commonage in another Man's Soil, I grant it to *A.* reſerving Rent; if the Rent be behind, I

cannot

cannot diſtrain the Beaſts of *A.* becauſe the Right of Commonage which every Man has runs through the *whole* Common, and I cannot ſay, that any *particular* Part of the Common is mine more than another: therefore it follows, that ſince no Man can diſtrain for Rent but on the Premiſſes demiſed, and it is impoſſible to diſcover any particular Part of the Common which I have a ſeparate Right to, to demiſe that, I can have no Remedy by Way of Diſtreſs for the Rent reſerved; nor can I have Remedy by *Aſſize* if the Rent be with-held from me, for the ſame Reaſon; in as much as the *Recognitors* of the *Aſſize* cannot have the View of any *particular* Part of the Common to which I have a Right, and therefore cannot put me in *Seiſin* of the Rent by a Twig or Turf of the Common.

tance, and conſequently no Aſſize or Diſtreſs lies for it.

So it is for *Tythes*, for a Reſervation of Rent upon a Leaſe of them is not good; becauſe there is no Place upon which the Diſtreſs can be taken, or any Land to be put in *View* to the *Recognitors*,

Rent cannot be reſerved on Leaſe of Tithes. Cro. Ja. 111. 2 Roll. Ab. 446, 451. Co. Lit. 47. a. 142. a.

Bro. 67, 80. 11 H. 4. 40. 5 Co. 3. a.

cognitors, or of which they may give *Seiſin* by a Twig or Turf.

How Rent may be reſerved out of a Rectory. 1 Chan. Ca. 79. Thorndicke v. Allinton. V. poſt.

But it has been decreed in Equity, that where a Rent *Charge* of 40 *l.* was deviſed out of a Rectory, the Glebe whereof amounted to but 40 Shillings a Year, that the whole Rectory ſhould be liable to the Payment of the Rent, and the Proprietor of the Rectory was decreed to pay the Arrears of Rent and Coſts.

Co. Lit. 47. a. Rent upon an incorporeal Inheritance may be reſerved to the King.

But a Reſervation out of theſe Sort of Inheritances is good to the *King*; becauſe the King by his Prerogative may diſtrain all the Lands of his Leſſees for ſuch Rent: and therefore, ſince he has a Remedy for the Rent, there is no Reaſon that ſuch Reſervation ſhould not be good.

Reaſon why an incorporeal Inheritance cannot have a Rent iſſuing out of it.

Another Reaſon why a Rent iſſues not out of the *incorporeal* Inheritance is this; becauſe every *incorporeal* Right (till by Age it was formed into a Preſcription) did originally riſe by Grant from the Crown, and ſuch Grants ſeem to be made for particular Purpoſes, as the

the Grant of a *Fair*, to be under the Protection of the Lord,—The Grant of an *Advowſon*, that the Patron ſhould appoint *able* and *fit* Perſons to the Church without any Proſpect of Profit,—And of *Common*, for the Benefit of the Beaſts of every one of the Tenants; And therefore to let ſuch *incorporeal* Inheritance for *Gable* or *Rent* was eſteemed contrary to the Deſign and Purpoſe of ſuch Grants: but the *corporeal* Rights of the Feud were truſted to the Lord to create a *Dependancy* for the better Service of the Government; and therefore as he might *hire* them for the perſonal Service and Attendance of Tenants, ſo for the ſame Reaſon he may do it for his own Profit, ſince ſuch Profit makes him better able to ſerve the Government.

And hence it is, that tho' a Reverſion and Remainder be *incorporeal*, and can paſs only by *Grant*, yet a Rent reſerved upon a *Grant* of them is good: for tho' the Grantor has no Remedy for them during the Continuance of the *particular Eſtate*; yet, ſince they relate to the Lands which were originally granted

Co. Lit. 47. a. Bro. 47. 1 Co. 62. b. Capell's Caſe. Perkins Sect. 627.

Rent reſerved upon a Reverſion or Remainder is good, though

an incorporeal Inheritance, but cannot be diſtrained for till the particular Eſtate is ended.

granted to make Profit of, the Judges have gone as far as they could to purſue the Intention of ſuch original Donations; and therefore have admitted ſuch Reſervations to be good *immediately*, ſince the Lands in which the Grantor had the Reverſion were originally given for that purpoſe, *viz.* to make Profit of. And this Conſtruction is the more reaſonable, becauſe in this Caſe there is a Remedy by *Diſtreſs* for all the Arrears when the Reſervation executes by the Determination of the *particular Eſtate*; whereas there is no Poſſibility of ſuch Remedy in the Caſe of *Tythes*, *Commons*, *Fairs*, &c.

Rent may be reſerved on Gift in Tail of a Meſnalty. Perkins Sect. 627.

So if there be Lord, Meſne and Tenant, and the Meſne maketh a Gift in Tail of the Meſnalty, reſerving Rent, ſuch Reſervation is good; becauſe the Tenancy may *eſcheat* to the Donee, and then the Donor has Remedy by *Diſtreſs* for all the Arrears.

Co. Lit. 47. a. 5 Co. 3. Jewel's Caſe. 2 Sand. 303. A Leaſe for Years being

But if a Leaſe for *Years* be made of an *incorporeal* Inheritance which lies only in *Grant*, reſerving Rent; ſuch Reſervation is good to bind the Leſſee

by Way of *Contract*; for the non-performance whereof, the Leſſor ſhall have an Action of Debt: becauſe, if the Leſſee undertakes to pay ſuch an annual Sum by his Deed, ſuch Undertaking conſtitutes a Right to it. And the Law in all Caſes gives Remedies adequate and correſpondent to every Man's Right: — Otherwiſe it is if they be leaſed for *Life*; becauſe no Action of Debt lies for Rent reſerved upon a Leaſe for Life; for Reaſons which will be given under this Head.

made of incorporeal Inheritance reſerving Rent, the Leſſor upon the Contract may bring an Action of Debt, ſecus if it had been a Leaſe for Life.

If a Man makes a Leaſe of Black Acre to commence *in Futuro*, and of White Acre to begin *in Præſenti*, rendering Rent payable at *Michaelmas* before the Commencement of the Term in Black Acre, this is a good Reſervation *immediately*; for it is but one entire Rent, and as ſuch is payable according to the Reſervation.

2 Roll. Rep. 467. Falſtaf's Caſe. A Leaſe made out of two different Acres, the one to commence in præſenti, the other in futuro, rendering Rent before the Commencement of the Term in one Acre, the Reſervation good.

So it is, if a Man grants a future Intereſt in Land; as if it be a Leaſe for Years, to commence five Years after the making of the Leaſe, the Leſſor may reſerve a Rent *immediately*; becauſe this

is

is a good *Contract* to oblige the Leſſee to pay; and the Leſſor may have an Action of Debt on the Contract, and may likewiſe have his Remedy by Diſtreſs for the Arrears when the Leſſee comes into Poſſeſſion.

Rent reſerved of the Veſture of Herbage good. Co. Lit. 47. a. Rol. Ab. 446.

A Leaſe of the *Veſture* or *Herbage* of Land reſerving Rent is good; becauſe the Leſſor may come upon the Land to diſtrain the Leſſee's Beaſts feeding thereon.

On what Conveyance a Rent Service may be reſerved.

Regula. Co. Lit. 144. a. 10 E. 4. 3. b. 21 H. 6. 8. b. Co. Lit. 193. b. 2 Rol. Abrig. 449.

That it may be reſerved upon every Conveyance that paſſeth *any Eſtate to the Tenant, or* enlarges *an Eſtate already in him.*—For the Rent being an annual Return by Way of Retribution for ſomething given, it follows, that where no Eſtate paſſeth by the Conveyance, there ought to be no Retribution or Return.—Beſides, the Thing given was anciently in Nature of a *Pledge* for the Rent, and therefore ought to be ſuch as the Giver might formerly have reveſted himſelf in, and now may have Recourſe

Recourſe to for a Diſtreſs for non-payment of the Rent: Hence therefore it is, that if the *Diſſeiſee* releaſe all his Right to the *Diſſeiſor*, reſerving Rent, the Reſervation is void.

So it is if there be a Lord and Tenant, and the Tenant holdeth of his Lord by *Fealty* and 20 *s.* Rent, and the Lord *releaſes* to his Tenant, or confirms his Eſtate in the Tenancy, yielding to him a Hawk or a Roſe yearly, this new Reſervation is void; becauſe there is no *Eſtate* given to the Tenant, for which he ſhould make that new Return of Service to his Lord: though upon ſuch Releaſe or Confirmation he may confirm the Tenant's Eſtate to hold by leſſer Services, as in this Caſe by *Fealty* and 5 *s.* Rent, for by the ſame Reaſon that he may releaſe his *Seignory*, he may likewiſe abridge himſelf of Part of it.

Lit. Sect. 438, 439. Co. Lit. 305. Dy. 230. b. Moor 631. Co. Lit. 193. b.

So if there be Tenant for Life, and he in the Reverſion releaſes to him in *Tail*, reſerving Rent, the Reſervation is good; becauſe the Tenant's Eſtate is *enlarged* by the Releaſe; and therefore the

Co. Lit. 193. b. 10 E. 4. 3. b. 13 Co. 55.

the Rent reserved ought to be paid in Return for the Inheritance given by the Releasor, and he has an *immediate* Remedy by *Distress* for Recovery of it.

Co. Lit. 139. b. 10 E. 4. 3. b. al con.

A Rent may be reserved upon a Release from one Joint Tenant to another.

So, says my Lord *Coke*, it is upon a Release that enures by Way of *Mitter le Estate*; as when one Joint Tenant releases to another, a Rent may be reserved: but Q. if such Release carries the Fee-Simple, whether such Rent be a *Rent Service*; inasmuch as the Releasee, being in from the first Feoffor, there can be no *Tenure* of the Releasor, and consequently the Rent must be *Seck*, unless there be a Clause of Distress in the Deed of Release: For so it is in Case of a Feoffment in Fee-Simple, since the Statute of *Quia Emptores Terrarum*, as is said before.

2 Rol. Ab. 448. Co. Lit. 144. a. Cro. Eliz. 595. Wicks v. Tillard. 2 Co. 54. 2 Inst. 673.

At common Law no Rent could be reserved upon a *Bargain* and *Sale*, because only an *Use* passed, which was not an Estate to which the Bargainor could have had Recourse for a Distress, but now by the Statute of 27 of *Hen.* 8. the *Possession* is *executed* to the Use, and

and therefore the Bargainor may have Recourſe to the Land for Diſtreſs.

There can be no Rent reſerved upon any Conveyance, that enures by Way of *Extinguiſhment* of the Eſtate of the Grantor; becauſe in ſuch Caſe there is no Reſervation left in him to create a *Tenure*: — And therefore if a Leſſee ſurrenders his Eſtate, reſerving Rent, the Reſervation is not good. But the Caſe put by *Rolls* muſt it ſeems be underſtood of a Leaſe for Life with ſuch a Reſervation; for ſuch a Reſervation may be good by Way of Contract upon a Surrender of a Leaſe for Years; for when the Leſſor takes an Aſſignment or Surrender of the Leſſee's Term, he agrees to take it under ſuch a yearly Rent, and ſuch Agreement or Contract is a good Foundation for an Action of Debt if it be not performed, whether the Agreement be by Deed or Parol.

2 Rol. Ab. 449. but the Ab. ſays, ſans fait q.

2 Leon. 80. Ray 222. Godb. pl. 183. 1 Vent. 242, 272. 2 Mod. 174. If a Leſſee ſurrenders his Leaſe, reſerving Rent, it is good by Way of Contract, ſo as to found an Action of Debt.

III. By

III. By what *Words* a Rent may be reſerved or created.
How ſeveral Rents may be reſerved in one Deed.
Of the Times of Payment in Law.

By what Words a Rent-Service may be reſerved.
Co. Lit. 47. a.
2 Rol. Ab. 449.
Perk. Sect. 625.
Plow. Com. 132. b. 137. b.

And here firſt of a Rent Service: this, as has been ſaid, being ſomething in Retribution for the Land that paſſeth, it muſt be reſerved by ſuch *Words* as imply a *Return* of *ſomething* that was not in the Grantor before, in Lieu of the Land given; and therefore *Reddendo*, *Reſervando*, *Solvendo*, *Inveniendo*, and ſuch like, are proper Words by which a Rent-Service may be reſerved.

Perk. 693. And theſe, as Perk. obſerves, are Words which are meant always of Things that the Leſſor has in his own Poſſeſſion, at the Time of the Leaſe made.

But if a Man maketh a Leaſe of Lands *except* 12 *d.* or *præter* 12 *d.* Rent; theſe are no good Reſervations; becauſe theſe are only Words proper to reſerve to the Leſſor Part of ſomething in being, and which would otherwiſe paſs by the Leaſe.

So it is if a Man makes a Leaſe *Salvo*, or ſaving 20 *s.* Rent, this is no good Reſervation; becauſe there can be no ſaving

ſaving of any thing not in *being*: And conſequently, a Rent-Service being a Return of ſomething, *not in the Leſſor*, in Lieu of the Land given, cannot be reſerved by *Words* that, in their moſt extended Signification, can only reſerve ſomething in *eſſe*.

But if there be Lord and Tenant by Knight's Service, and the Tenant makes a Gift in Tail to hold by a Penny, *Salvo forinſeco ſervitio*, that is, ſaving to the Tenant ſuch Service by which he held the Land of his Lord; this is good to make the Donee hold by Knight's Service: for tho' the Tenant had not the Service in himſelf before the Gift, yet it was a Service in *being*, for the Tenant was obliged to do it to his Lord; and therefore it is but reaſonable, that he might ſave that Service to himſelf, which he was, at the Time of the Gift, obliged to perform to another. Perk. Sect. 650.

So it is, if there be Lord, Meſne and Tenant, and the Meſne holds by Knight's Service, and the Tenant by Socage, if the Tenant makes a Gift in Tail reſerving Rent, and ſaving the Knight's 2 Rol. Ab. 449.

Knight's Service; the Donee, in this Caſe, ſhall likewiſe hold by Knight's Service: becauſe this Service was in *being*, and chargeable upon the Land at the Time of the Gift, though the Tenant was not obliged to do it himſelf; and therefore may be reaſonably ſaved to him, who parts with the Land upon which it was before chargeable: And the rather, as ſuch Conſtruction is moſt beneficial to the Public, and the Donee not injured thereby, becauſe he willingly takes it under ſuch Charge.

Moor 459. Cro. Eliz. 482. 2 Rol. Ab. 449. Farrinton v. Wiſe.

By Articles of Agreement indented, between *A.* and *B.* it is covenanted and agreed, that *A.* doth let black Acre to *B.* for five Years from *Michaelmas* following; provided always, that *B.* ſhall pay at *Michaelmas* and *Lady-day* 10 *l.* by even Portions yearly; this Proviſo is a good Reſervation of the Rent: for as the Words amount to an immediate Demiſe of the Land, ſo the Rent, which is but a Retribution for the Land, ought to be paid immediately; and it cannot be conſtrued to be a Sum in Groſs, becauſe by the Words of the Articles, (which

(which, being indented, are the Words of both Parties,) it is to be paid yearly.

If Lands be leaſed to *A.* and he covenants and grants to render and pay, for the ſaid Lands every Year during the ſaid Term, to the Leſſor, his Heirs and Aſſigns, 10 *l*; this amounts to a Reſervation. So it is, if the Leſſor covenants that the Leſſee ſhall hold and enjoy the Land; and the Leſſee, *in conſideratione Præmiſſorum*, covenants to pay the Leſſor, his Heirs and Aſſigns, an annual Rent of 10 *l.* during the Term; for here the Rent is plainly given as a Retribution for the Land which the Leſſee holds; and this being by Indenture, the Words are looked upon to be ſpoken by both Parties; and therefore may reaſonably be conſtrued, that the Leſſor, in Conſideration of the Land demiſed, reſerves the Rent agreed upon, by Way of Retribution or Return: and therefore it has been adjudged, that ſuch Rent goes with the Reverſion to the Heir; and the Executor of the Leſſor ſhall never recover by Virtue of the Covenant.

Plow. Com. 131. 134. a. Cro. Car. Drake v. Monday. Cro. Ja. 398. 2 Roll. Ab. 449. 1 Rol. Rep. 80, 81. Altho v. Heming. 2 Bulſt. 281. Sir William Jones 231.

When the Reſervation of the Rent is made by proper *Words*, in what Caſes they admit of *ſeveral Reſervations* in the ſame *Leaſe*.

Regula. Hob. 172. Moor 51, 52. 5 Co. 54, 55. 2 Rol. Ab. 448. Moor 199, 202. Knight's Caſe.

And here a Difference is to be obſerved, between a Rent *reſerved intire in the Reddendum*, upon a Demiſe of ſeveral Things in the ſame Leaſe, (for the Reſervation ſhall be taken as one and *intire*); and where Rent is *not at firſt reſerved intire*, but upon the Reſervation is *ſeveral*, and *apportioned* to the ſeveral Things demiſed: — For Inſtance, if a Leaſe be made of *ſeveral* Houſes, *rendering* the annual Rent of 5 *l.* at the two uſual Feaſts, *viz.* for one Houſe 3 *l.* for another 10 Shillings, and for the reſt of the Houſes the Reſidue of the ſaid Rent of 5 *l.* with a Clauſe of Re-entry into all the Houſes for non-payment of any Parcel of the Rent: this is but *one* Reſervation of *one intire* Rent; becauſe all the Houſes were leaſed, and the 5 *l.* was reſerved as one *intire* Rent for them all; and the *viz.* afterwards does not alter the Nature of the Reſervation, but only declares

What *Words of the Parties* ſhall amount to an *intire*, or ſeveral Reſervations.

Dyer 339. b. 2 Rol. Ab. 448. Winter's Caſe. 5 Co. 55.

declares the Value of each Houſe. But if the Leaſe had been of 3 Houſes, rendering for one Houſe 3 *l.* for another 20 *s.* and for the third 20 *s.* with a Condition to re-enter into *all* for the non-payment of *any Parcel*; theſe are three *ſeveral* Reſervations, and in the Nature of three diſtinct Demiſes, for which the *Avowry's* muſt likewiſe be ſeveral; for each houſe, in this Caſe, is only chargeable with its own Rent; the *intire* Sum being *not at firſt reſerved* out of all the Houſes demiſed, and afterwards *apportioned* to the ſeveral Houſes according to their reſpective Value, as in the former Caſe: but the particular Sums are at firſt reſerved out of the ſeveral Houſes; and therefore the non-payment of the Rent of one Houſe, can be no Cauſe of Entry into another.

Moor 98. on this Diſtinction. V. poſt.

So if the Leſſor had reſerved out of one Houſe 3 *l.* during 5 Years, and 20 *s.* out of another Houſe during 10 Years, and reſerve another Rent out of the ſecond to commence 10 Years after; theſe are diſtinct Reſervations and ſeveral Demiſes, and each Houſe is ſubject to a Diſtreſs for its own Rent.

5 Co. 55. 2 Rol. Ab. 448.

Cro. Eliz. 341. Tanfield v. Rogers.

So if *A.* demiſes the Scite and Demeſnes of the Manor of *C.*; and alſo the Manor of *C.*; and all other Lands and Tenements thereunto belonging, reſerving for the ſaid Scite, and Demeſnes and Premiſſes therewith letten, 3 *l.*; and for the ſaid Manor and Premiſſes therewith letten 9 *l.*; this is not a joint but a ſeveral Leaſe, *viz.* one Leaſe for the Scite and Demeſnes, and another for the Reſidue of the Manor; and the Reſervations are alſo ſeveral and diſtinct.

If a Leaſe be made of two Manors, *Habendum* one Manor for 20 *s.* and the other Manor for 10 *s.* theſe are ſeveral Reſervations; and each Manor is charged with its reſpective Rent.

10 Co. 106. a. 107. b. Layfeild's Caſe. Hob. 276.

A. made a Leaſe of a Cellar for a Year, and if at the End of the Year the Parties ſhould agree that the Demiſe ſhould continue, then to have and to hold the ſame for 3 Years, *Reddendo inde annuatim durante Dicto Termino* 40 *s.*; this is one *intire* Reſervation, as well for the firſt Year as for the 3 Years: for the Words *Dicto Termino*

Termino extend to both Terms indifferently.

And as there may be ſeveral Reſervations in the ſame Leaſe, by the *Words of the Parties*, ſo there may by *Act of Law*; as when a Leaſe is made to an Abbot or Biſhop in their *public* Capacities, and *T. S.* reſerving a Rent; the Leſſees are not *Joint-tenants*, but Tenants in *Common*: and therefore the Reſervation muſt be ſeveral, and the Reverſion, to which the Rent is incident, muſt follow the Nature of the particular Eſtates on which it depends; and therefore muſt be ſeveral too.

Several Reſervations may be created by Act in Law as well as by the Words of the Parties. Moor 202.

So if there be two Tenants in common, and they make a Leaſe for Life, rendering Rent; this Reſervation, tho' made by *joint* Words, ſhall follow the Nature of the Reverſion, which is *Several*, in the Leſſors; and therefore they ſhall be put to their ſeveral *Aſſizes* if they be diſſeiſed, as if there had been *diſtinct* Reſervations: But if the Reſervation had been of an Horſe or an Hawk, which is not in its own Nature *ſeverable*, then, for the Neceſſity

Lit. Sect. 314. Co. Lit. 197. a. Moor 202.

ſity of the Caſe, the Law admits them to join in one *Aſſize*.

By what *Words* a Rent *Charge*, or Rent *Seck*, may be granted, and the Manner of creating them.

Lit. Sect. 218.

Difference between a Rent Charge and Rent Seck.

A Rent *Charge* and a Rent *Seck* differ only in this, that the Grantee has a Remedy for the Recovery of the former without an *actual Seiſin*, but not for the latter:—The granting them or creating them may be conſidered together: And the common and ſafe Way is to do it in this Manner: When a Man ſeized of Lands grants, by Deed Poll or Indenture, a yearly Rent to be iſſuing out of the ſame Land, to another, in Fee, in Tail, or for Life, *&c. with* a Clauſe of Diſtreſs, this is a *Rent Charge*; and if the Grant be *without* Clauſe of Diſtreſs, this is a Rent *Seck*.

Lit. Sect. 217. Plow. 134. a. Co. Lit. 170. a.

By what Words a Rent Charge is created.

And ſince the Statute of *Quia Emptores, &c.* if a Man makes a Feoffment in Fee, reſerving Rent, and *if the Rent be behind, that it ſhall be lawful for him to diſtrain*, this is a *Rent Charge*;

the Word *reſerving* being in this Caſe conſtrued by ſome to amount to a Grant of the Feoffee;—But ſuch Rent, without the Clauſe of Diſtreſs, would be *Seck.*

And in many Caſes, without Words of Granting, the Law creates a *Rent Charge*; becauſe it is the Deſign of the Law to render all Contracts binding and effectual, ſo far as the Intention of the Parties may be gathered from the Deed; and ſuch Interpretation is made *ſtrongeſt* againſt the Grantor, becauſe he is preſumed to receive a valuable Conſideration for what he parts with: And hence it is, that if a Man obliges himſelf to *J. S.* in an annual Rent of 10*l.* *Percipiendum annuatim de Manerio de D.* and bindeth the ſaid Manor, and all the Chattels therein to a Diſtreſs; this amounts to a good Grant of the Rent, and *J. S.* may diſtrain for it.

In what Caſes the Law creates a Rent Charge without Words of granting. 2 Rol. Ab. 424.

So if I bind my Goods and Lands to the Payment of a yearly Rent to *J. S.* this is a good Rent Charge with Power to diſtrain, tho' there be no expreſs

Co. Lit. 147. a. 2 Rol. Ab. 424. Bro. tit. Rents 14.

Words of *Grant or Diſtreſs*: Or if I grant, that, if ſuch Rent be in Arrear, *J. S.* ſhall diſtrain for it in the Manor of *D.* this is a good Rent Charge; for in all theſe Caſes it is evidently my Intention that my Land be liable to the Charge, when I bind it to the Payment of ſuch a Rent, or I give *J. S.* a Power to diſtrain for it in my Land; for the Diſtreſs that I impowered him to take is in the Nature of a Pledge, which always ſuppoſes that it ſhall remain in the Perſon's Hands to whom it is given, till it be redeemed by the Payment of the Money for which it is originally taken.

Co. Lit. 147. a.
2 Rol. Ab. 424.
7 Co. 24. a.
Lit. Sect. 221.
What a Rent Charge in Fee or in Tail.

So it is, if I grant to *J. S.* that he and his Heirs, or the Heirs of his Body, ſhall diſtrain for 40 *s.* Rent in my Manor of *D.*; this is a good Rent *Charge* in Fee or in Tail: becauſe the Power of diſtraining is in one Caſe given to the Heirs general, and in the other to the Deſcendants of the Body of *J. S.* and whoever has a Power of diſtraining, has an *Eſtate* in the Rent for which the Diſtreſs is given, for the former Reaſons.

Nota.

But

But if I grant a Rent of 40 *s.* out of the Manor of *D.* and if the Rent be behind, that the Grantee ſhall diſtrain in my Manor of *S.*; this Power of Diſtreſs in my Manor of *S.* ſhall not amount to the Grant of a *Rent Charge* out of the Manor of *S.*: for tho', in the former Caſes ſuch Conſtruction is admitted to ſupport the Intention of the Parties, where the Grant is not explicite; yet in this Caſe, the Reaſon of ſuch Conſtruction fails; becauſe here is a plain Grant of the Rent out of the Manor of *D.* and the Diſtreſs is given in *S.* as a Means for the Recovery of it, for which he had no Remedy by the Grant it ſelf: and therefore the Rule, *Expreſſum ſemper facit ceſſare tacitum*, takes place here; that where the Intentions of the Parties are evident, there that Conſtruction ſhall never be admitted, which the *Law* only allows in *dubious* Contracts, *Ut Res magis valeat quam pereat*; for if that Manner of Interpretation were admitted, the Grant might be made double, and the Grantor twice charged, againſt the Deſign of the Grant.

A Grant of 40 s. out of the Manor of Dale; and if the Rent be behind, that the Grantee ſhall diſtrain in the Manor of *S.* not good to create a Rent Charge in *S.*
2 Rol. Ab. 425.
Co. Lit. 147. a.
7 Co. 24.

Thus

9 H. 6. 9. Thus if there be Lord and Tenant by certain Rent, and the Tenant grants by Indenture to his Lord, that he may diſtrain for the ſame Rent in all his Lands within the ſame Town, and he hath other Land there; yet this Grant does not create a *new* Rent, but only gives a more extenſive Remedy for the old; for tho' there be a Diſtreſs to the Lord, in Land which he could not diſtrain for before the Grant; yet, by the expreſs Words of the Parties, that Diſtreſs is only a Remedy for the Rent already in being; and therefore by no *Implication* ought to be extended to a new Grant.

If a Rent Charge be granted to *A.* and that a Stranger ſhall diſtrain for the Uſe of the Grantee, if the Rent, &c. this is good. 1 Rol. Ab. 425.

If a Rent be granted to *A.* and if the Rent be behind, that a Stranger ſhall diſtrain for it, for the *Uſe* of the *Grantee*; this is a good *Rent Charge* in *A.* and the Diſtreſs limited to a Stranger for his Benefit, is, in Effect, making him the Grantee's Servant for that Purpoſe; and what a Man may do by one Servant, he may do by himſelf, or any other.

But

But if the Diſtreſs had been limited to a Stranger, without ſaying for the *Benefit* of the *Grantee*; ſo that the Limitation of the Diſtreſs may ſeem to be independant on the Grant, and without Relation to it; this Diſtreſs does not make it a *Rent Charge*, ſince, by no Words in the Deed, the Diſtreſs ſhall be applied to the Uſe or Advantage of the Grantee. Ib. Secus, if not mentioned to be for the Benefit of the Grantee.

If a Man grants a Rent out of three Acres, and grants over, that if the Rent be in Arrear, the Grantee ſhall diſtrain for the Rent in one of the Acres (naming it); this is one *intire* Rent, but it cannot be a Rent Charge for the whole; becauſe the greateſt Part of the Land out of which it iſſues, is not chargeable with any Diſtreſs for the Recovery of it: and *Denominatio ſumenda a Majori*, it is taken to be a Rent *Seck*; for, by the Words of the Grant, the Grantee can diſtrain only in the one Acre: and whenever the Remedy by Way of Charge for the Rent is *Non-commenſurate* to the Rent, the Rent is called *Seck*, and the Charge is A Rent granted out of 3 Acres, with a Clauſe of Diſtreſs out of one, this a Rent Seck as to two, and a Rent Charge as to one, and the Grantee may diſtrain out of the ſaid Acre. Co. Lit. 147. b. 7 Co. 24. b.

is only an Appurtenant or Appendix to the Rent, and does not give it its Denomination: And the Reaſon is, becauſe, if the original Grant ſhould be loſt or worn out by Time, and a Man were to *preſcribe* for it, if he were to give it the Denomination of a Charge, it would graſp more Land, than was originally intended to be charged; and therefore the Law binds them down to the Domination of the Rent as *Seck*, and to ſet forth the Charge as an Appurtenant, that by Length of Time no more ſhould be comprehended in the Charge, than was originally intended in the Grant of that Charge.

A Rent to 2 and their Heirs out of 1 Acre; and that one only ſhall diſtrain; as to one is a Rent Seck; but if the one dies to whom the Diſtreſs was *not* given, then the other may diſtrain in the whole Eſtate.
Co. Lit. 147. b.
7 Co. 24. b.

So it is if a Rent be granted to two and their Heirs out of one Acre, and that it ſhall be lawful for one of them and his Heirs to diſtrain for it, this is a Rent *Seck*; and the Diſtreſs given to one is only an Appurtenant to the Rent: and this comes within the Reaſon of the former Rule, becauſe both the Grantees have not a Remedy by Way of Charge commenſurate to the Rent granted. But if he, to whom the Diſtreſs was *not* limited, dies, the Survivor

vivor ſhall diſtrain; becauſe the whole Rent is then in him, and the Remedy by Diſtreſs, which was given to him and his Heirs, ought, in Reaſon, to be extended to the Recovery of the whole Eſtate given, and he is now in *Seiſin* of the whole Rent under the firſt Grant.

A. grants a Rent to B. and his Heirs, after the Death of C. who is Tenant for Life; this good. 2 Rol. Ab. 425.

If *A.* leaſes a Manor for Life, rendering 5 *l.* Rent, and afterwards grants this *Rent* in Fee to *B.* to have after the Death of Tenant for Life, and that *B.* may diſtrain for it after the Death of Tenant for Life, this is a good Grant of a Rent Charge of 5 *l.* to *B.* in fee; for tho' *A.* granted only the 5 *l.* reſerved upon the Leaſe, and that Grant was not to take Effect till after the Expiration of the Leaſe; yet inaſmuch as the Grantee has Power to diſtrain after the Death of Tenant for Life, it ſhould ſeem, as if he had granted the 5 *l.* reſerved upon the Leaſe, only to aſcertain the *Quantum* of the Rent which the Grantee ſhould have out of the Manor after the Expiration of the Leaſe; for *Falſitas Demonſtrationis non deſtruit Veritatem Rei.*

So

Bro. tit. Grant, 69. 73. 2 Roll. Ab. 425. a. *A.* grants a Rent Charge to *B.* which he has of the Grant of his Father, tho' *A.* has no ſuch Rent from his Father, yet a good Rent Charge to *B.*

So if *A.* grants and confirms to *B.* a Rent of 5 *l.* to be taken out of his Lands, *which Rent* A. *has of the Grant of his Father*; tho' *A.* had never any ſuch Rent from his Father, yet this Grant of *A.*'s ſhall be good to *create* a Rent Charge in *B.*: for it is evidently the Intention of *A.* that *B.* ſhall have a Rent of 5 *l.* out of his Land; and a Miſtake or Error, in the Deſcription of the Thing referred to, ſhall not render the true Deſign of the Contract ineffectual and void.

A. grants a Rent Charge to *B.* and his Heirs, and grants that he may diſtrain during his Life; this good during his Life, and a Rent Seck after he dies.

If a Man grants a Rent out of his Land to *J. S.* and his Heirs, and grants that he may diſtrain for it *during his Life*, this is a Rent Charge in *J. S.*; becauſe he may diſtrain the Land out of which it iſſues, during his own Life: but it ſhall be *Seck* in the Hands of his Heirs, becauſe by the expreſs Words of the Deed the Remedy was to ceaſe upon his Death. *Aliter* if the Diſtreſs had been limited only for Years; for then the intire Rent had been *Seck:* becauſe the Remedy being temporary, is not adequate to the Right which is per-

perpetual; and a Remedy inadequate and not correſpondent to a Man's Right is no Remedy at all.

If a Man ſeiſed of 20 Acres of Land, grant a Rent of 20 *s.* *Percipiendum de quâlibet Acrâ Terræ ſuæ*, or out of every Acre of his Land; this is in the Nature of a ſeveral Grant out of every Acre; for the Grant ſhall be taken moſt ſtrongly againſt the Grantor, and the Grantee ſhall have 20 *s.* out of each Acre. Co. Lit. 147. b.

If there be two Tenants in common, and they grant a Rent of 20 *s.* *per Annum* out of their Land, the Grantee ſhall have 40 *s.* Rent; for as their Eſtate is ſeveral, ſo ſhall their Grant be too: and therefore each ſhall be taken to grant a ſeveral Rent of 20 *s.* 5 Co. 7. b. Plow. 140. b. 161. b. 171. a. 289. Co. Lit. 197. a. 267. b.

If a Rent be granted in the Manor of *D.* *Percipiendo* of 100 Acres Parcel of the ſaid Manor, with a Clauſe of Diſtreſs in the ſaid 100 Acres; this Rent affects only the 100 Acres: for the laſt Words explain in what Part of the

the Manor the Rent and the Diſtreſs ſhall be taken.

8 Co. 154. b. Co. Lit. 147. If *A.* bargains and ſells Land to *B.* by Indenture, and, *before Inrollment*, they both join in a Grant of a Rent Charge to *E.*; this, after the Inrollment, ſhall be conſtrued the Grant of *B.* and the Confirmation of *A.*: becauſe, when the Bargain and Sale is inrolled, it has the Effect of a Deed inrolled from the *making thereof*; and therefore it muſt be the Grant of *B.* who had the Land at the Time of the Grant made: But, if the Deed had *never been inrolled*, then it ſhould have been the Grant of *A.* and the Confirmation of *B.*; becauſe the Land never paſſes from *A.* the Deed being ineffectual, and void without Inrollment.

Of the Days of *Payment*.

Regula. And theſe are *by* the particular *Appointment of the Parties* in the *Deed*, or *by Appointment of Law* in Default thereof: — And here it is true, that *the Law will never control the expreſs Appointment of the Parties, where ſuch Ap-*

Appointment will anſwer their Intention: but tho' there be particular Days mentioned in the Deed for the Payment of the Rent; yet if the Manner of ſuch Appointment will not fully anſwer the Deſign of the Contract, the Law in ſuch Caſe will *alter* or *tranſpoſe* the Words of the Deed; becauſe it is the great End of the Law to execute all Contracts, however unwarily or inartificially framed, according to the Purport, and Intention of the Parties, upon the whole Deed: Thus, for Inſtance, if *A.* makes a Leaſe to *B.* the ſixth of *Auguſt*, rendering yearly the Rent of 40*s.* at two Terms of the Year; *viz.* at *Lady-day* and *Michaelmas*, by equal Portions; tho', in this Caſe, by the Appointment of the Parties, *Lady-day* be the firſt Term mentioned, yet the firſt Payment ſhall be made at *Michaelmas* enſuing the Date of the Leaſe; for, without ſuch Tranſpoſition, the Intention of the Parties could never be fulfilled; becauſe the Rent is reſerved annually, and the Leſſor would loſe the Profits of one half Year, if the Rent was not payable the firſt *Michaelmas*: for then the Leſſee muſt enjoy the

The Law will tranſpoſe Words where they do not fully anſwer the Deſign of the Contract.

Hob. 172. Co. Lit. 217. b. Plow 171. 172. a. 2 Brownl. 221.

Land, from the Date of the Leaſe to the firſt *Michaelmas*, without paying any thing: and ſo likewiſe, from the laſt *Lady-day* of the Term to the Expiration of it; becauſe tho' the Leaſe ended in *Auguſt*, yet the Payment was not to be made till the *Michaelmas* following, before which Time the Leaſe expires.

A Leaſe made from the firſt Day of May, reſerving Rent payable quarterly, ſhall begin from the Date of the Leaſe. 2 Rol. Ab. 449, 450.

If a Man makes a Leaſe the firſt Day of *May*, reſerving Rent payable quarterly; this ſhall be intended quarterly from the *making* of the Leaſe: for if the Beginning of the Quarter ſhould be conſtrued to be any other Day than the Date of the Leaſe, the Leſſor would loſe the Profits of his Land for ſome Time; and conſequently not have quarterly Payment made during the Continuance of the Leaſe.

A Leaſe conditioned to pay 10 l. at Michaelmas and Lady-day, by even Portions, during the Term, good, tho' *not* made payable yearly.

If a Leaſe be made for Years, provided that the Leſſee ſhall pay for it, at *Michaelmas* and *Lady-day*, 10 *l.* by equal Portions *during* the *Term*; tho' this Rent is *not* made payable *yearly*, yet the Law conſtrues it to be ſo: becauſe it is payable at the two Feaſts

during the Term, and then conſequently it muſt be paid *yearly*; becauſe if there be any Omiſſion of the Payments any one Year during the Leaſe, it is not paid at the two Feaſts during the Term.

So if the Rent had been payable yearly, without ſaying *during* the ſaid *Term*; yet the Payment muſt be made every Year during the Continuance of the Leaſe. Moor 459.

If a Man grants a Rent of 10 *l.* to another, payable at the two uſual Feaſts of the Year; this ſhall be intended by *equal Portions*, tho' not ſo mentioned in the Deed: becauſe where there are two ſeveral Days appointed for Payment, it is the moſt equal Conſtruction, that a Moiety of the Rent ſhall be paid at each Day. 2 Rol. Ab. 450.

And if a Leaſe be made, rendering Rent at the two uſual Feaſts of the Year, without *ſpecifying* what Feaſts in certain; the Law conſtrues ſuch Payments to be made at *Michaelmas* and *Lady-day*, becauſe thoſe are the uſual Ib.

Days appointed in Contracts of this Nature for Payments.

10 Co. 127. Clan's Caſe. Cro. Ja. 310. 500. Cro. El. 380. 4 Leon. 247. Cro. El. 565, 575.

Tenant for Life makes a Leaſe for Years, if he ſo long lives, reſerving Rent payable at the two uſual Feaſts in the Year, or 13 Weeks after, if the Leſſor dies between one of the Feaſts and Day of Payment, the Leſſee pays no Rent for the half Year.

Leſſee for Life grants an under Leaſe for two Years, if he ſo long lived, reſerving yearly during the Term 100 *l.* at *Michaelmas* and *Lady-day*, by equal Portions, or within 13 Weeks after every of the ſaid Feaſts; if the Leſſor dies after *Michaelmas*, and within 13 Weeks, there is no Rent due for the laſt half Year: becauſe the Leſſee has Election in this Caſe, either to pay the Rent at *Michaelmas*, or any Time during the 13 Weeks; and if it be not paid at *Michaelmas*, it is then the ſame as if the Rent had been made payable 13 Weeks after *Michaelmas* only: and conſequently the Leſſor dying, and the Leaſe thereby determining before the Rent became due, the Leſſee ſhall not be obliged to pay it: for the Leſſee ſhall not be obliged to make any Return or Retribution for a Thing he has not enjoyed to the Day he was to make the Retribution.

Cro. Ja. 227. 223. Barwick v. Foſter.

But if Tenant in Fee makes a Leaſe for Years, to begin at *Michaelmas*, rendering

dering 100*l.* *per Annum*, at *Michaelmas* and *Lady-day*, or within ten Days after every Feaſt; it ſeems, by the better Opinion, that the Rent is due the *laſt Michaelmas* Day of the Term, without any Regard to the 10 Days: for the Reſervation being annual, at the two Feaſts, or within ten Days, it ſhall be conſtrued at the End of every ten Days *during the Term*, as moſt agreeable to the Deſign of the Contract; and therefore the Law rejects the ten Days after the *laſt Feaſt*, becauſe the Term ending at *Michaelmas*, there cannot be ten Days after it *during the Term* for Payment of the Rent. And this Conſtruction is the more reaſonable; becauſe, to give the Leſſee his Election to make the laſt Payment either at *Michaelmas* or ten Days after, as in the former Caſe, were to put it in his Power to avoid Payment of the laſt half Year's Rent: for if it were to be conſtrued not to be due till the End of the ten Days, the Leſſor could never oblige him to pay it; becauſe then the Term would be ended before the Rent became due: but the Addition of the ten Days was only to *enlarge* the Time of *Payment*,

Yel. 167. 1 Brownl. 220. 1 Bulſt. 1.

Secus of a Leaſe for Years made by Tenant in Fee.

ment, but not to *prevent* the Payment, or to remit any Part of the Rent.

IV. To whom Rent may be reſerved or granted: And by what Words the Rent, being reſerved, may be *continued* to thoſe that are to have the Reverſion after the Death of the Leſſor.

Regula. *To whom Rent may, or may not be reſerved.*

Lit. Sect. 346. Co. Lit. 143. b. 2 Rol. Ab. 447. Co. Lit. 47. b.

And here *Littleton*'s Text is to be laid down as a ſure Rule, *that no Rent (which is properly called Rent) may be reſerved upon any Feoffment, Gift, or Leaſe; but only to the Feoffor, Donor, Leſſor, or to their Heirs, and in no manner may it be reſerved to any* ſtrange *Perſon:* And the Reaſon of the Rule is this; *becauſe the Rent is ſomething paid by Way of Retribution for the Land*; and therefore ought to be made to him from whom the Land paſſes:— Beſides, the Reſervation to a Stranger was prohibited to avoid the Danger of *Maintenance*; for, if they were allowable, Perſons might make Reſervations to powerful Men, who might extort more from the Tenant than was originally contracted for: And therefore, I preſume,

preſume, it was, that the *King* was excepted out of the Rule, and allowed to make the Reſervation of Rents to a Stranger; becauſe there could be no Danger of Maintenance in this Caſe, there being no Perſon ſo great and powerful as the King himſelf, who parted with the Land.

Moor 1 62
Co. Lit. 143.
2 Rol. Ab. 447.

If therefore *A.* enfeoffs *B.* upon Condition that *B.* and his Heirs ſhall render to *C.* and his Heirs, a yearly Rent of 10 *l.*, and if he fails, that it ſhall be lawful for *A.* and his Heirs to re-enter; this is not in the Nature of any Sort of Rent, but a Sum in *Groſs*, which the Feoffee is obliged to pay to prevent the Re-entry of the Feoffor. For at common Law, before the Statute of *Quia Emptores*, *&c.* it could not be good as a *Rent Service*, becauſe nothing *paſſed* from *C.* for which a Retribution ought to be made: — Nor can it be good by Way of *Rent Charge*, becauſe *C.* hath no Remedy given him by the Deed to charge the Land with it, or otherwiſe to recover it: — Nor is it a *Rent Seck*, becauſe tho' it ſhould be once paid to *C.* and he thereby have

A. enfeoffs *B.* on Condition that he pays 10 s. per An. to *C.* and his Heirs; for non-payment a Clauſe of re-entry to *A.* and his Heirs; this no Rent to *C.*
Lit. Sect. 345.

Seiſin of it, yet he ſhall never have an *Aſſize* for the Recovery of it; becauſe the Penalty by the Deed is a Re-entry to *A.* and his Heirs, which for ever determines it.

Co. Lit. 213. But if *A.* and *C.* had in this Caſe joined in a Feoffment of the Land by Deed, reſerving Rent to them both and their Heirs, and the Feoffee had granted, that it ſhould be lawful for them and their Heirs to diſtrain for the Rent, this had been a good *Rent-Charge* to them both: becauſe *C.* being Party to the Deed, has a Remedy by Diſtreſs, for the Recovery of it; and when the Feoffee impowers *C.* to diſtrain on the Land, ſuch Grant, as is already obſerved, always ſuppoſes that the Diſtreſs, which is in the Nature of a Pledge, ſhall remain in the Perſon's Hands to whom it is given, until it be redeemed by the Payment of the Thing for which it was originally taken.

Cro. Car. 288, 289. Sir Wm. Jones 308, 309. But where the Huſband poſſeſſed of a Term for Years in his own Right, joins with his Wife in an Aſſignment of the Term, reſerving Rent to him and his

his Wife, and the Survivor of them, if they ſhall ſo long live; and if the Rent be in Arrear, that it ſhall be lawful for them and the Survivor of them, and for the Aſſignees of the Survivor of them, to re-enter, but the Wife never ſeals or delivers the Deed, this Rent determines by the Death of the Huſband; for it could be no good Reſervation to the Wife, becauſe ſhe had no Intereſt in the Land to part with, and therefore could have no Rent Service reſerved to her by Way of Retribution for a Thing ſhe had never in her to part with: nor can this amount to a Grant of a *Rent Charge* to her, as in the former Caſe of the Feoffment it did to *E.*; becauſe here, the Wife, having never ſealed and delivered the Deed, could be no Party to it; and there does not appear to have been any Clauſe of Diſtreſs limited to the Wife by this Deed, as there was to *C.* by the Deed of Feoffment; and conſequently it could not be a *Rent Charge* upon the Land: nor is it good as a *Rent Seck* in her, becauſe iſſuing out of a Term for Years, it muſt in its Nature be a Chattel Intereſt, for which no *Aſſize* lies, which

2 Rol. Ab. 450. Bland v. Inman. 2 Sand. 368.

which is the only Remedy, after Seiſin, for the Recovery of a Rent *Seck:* nor would the Executors of the Huſband be intitled to the Rent, tho' it was limited to them and the Survivor of them, and the Aſſigns of the Survivor during the Term; becauſe the Reſervation to the Wife was evidently intended to create an Intereſt and Right in her to the Rent, and therefore ſhall not be taken as Words of *Limitation*, againſt the original Deſign of them.

Hob. 130. 2 Rol. Ab. 447. Lit. Sect. 346. Co. Lit. 99. b. 213. a.

If a Man makes a Leaſe for Years, reſerving Rent to his Heirs; or makes a Leaſe to commence after his Death, reſerving Rent; this is Rent *Service* ariſing in the Heir, not by Way of any *Purchaſe* of ſuch Rent, but as an *Incident* to the *Reverſion* deſcending to the Heir: and therefore may be releaſed by the Anceſtor during his Life, which it could not be, if it were a *New Purchaſe* in the Heir. And ſo it is if the Rent was reſerved upon a Leaſe for Life, or Gift in Tail; the Reaſon is, becauſe the Reverſion deſcends from the Anceſtor to ſuch Heir, and the Rent Service is incident to the Reverſion:

verſion: And the Anceſtor might as well contract for any new Incident to ariſe to ſuch Reverſion, as a Man that hath an Eſtate in Land might grant ſuch original Charges.

But if the Reſervation had been made to the *Son*, tho' he happened afterwards to be Heir, ſuch Reſervation is void: for it cannot be good by Way of Rent Service, becauſe the Son has not the Reverſion to which the Rent is incident at the Time of the Leaſe made; and, if the Son dies before the Rent commences, it may go to a different Perſon than the Reverſion, which belongs to the Heir of the Father: And ſuch Reſervation cannot be good by Way of *New Grant*, becauſe the Word *Reſervation* will not import a new Grant, unleſs it be made to the Perſon from whom ſuch Intereſt moves. Hob. 130. 2 Rol. Ab. 447. 2 Sand. 307.

If an original Grant be made of a Rent, to commence after the Death of *J. S.* it is good: for this is not like the Caſe of Lands where the *Livery* muſt carry the Freehold immediately, and where the Abeyance, for Want of diſtinguiſhing Bro. tit. Grant 86. 8 H. 7. 3. Plow. 156. Palm. 29, 30. 2 Vent. 204.

tinguiſhing where the Freehold is, may be of Prejudice to the Rights of others; for if the Freehold was to be granted *in Futuro*, and a Man had brought his *Præcipe* againſt the Grantor, after he had proceeded in it a conſiderable Time, the Writ might *abate* by the Freehold's veſting in a Stranger, by Reaſon of a Conveyance made by the Grantor before the Writ brought. But the Grant of a Rent *de Novo*, is not attended with the like Inconveniency; for no Man can have a *Precedent* Right to a Thing which is originally *created* by the Grant itſelf. Yet Q. at what Diſtance of Time ſuch Charges may be allowed to commence, whether it muſt not be after the Lives of Perſons in *eſſe*; for if they be *indefinite*, they ſeem to have the ſame Tendency to a *Perpetuity* as any contingent Remainders or executory Intereſt: And the bare Affection of a Perpetuity is ſufficient to damn any Conveyance.

Bro. tit. Grant, 86. 8 H. 7. 3. Plow. 156.

But a Rent in *eſſe*, or already created, cannot be granted to commence after the Death of *J. S.* becauſe to ſuch Rents, there may be *precedent* Titles; and

and therefore ſuch Grants are not good; for ſuch Freeholds, by thus being ſplit and ſevered, do *hide* the Perſon in whom the Right is: And therefore the Party that has Right will not be able to diſcern againſt whom to bring his *Præcipe* for the Recovery of it.

And as there can be no Reſervation to a Stranger during the Life of the Leſſor; ſo neither can a Rent be reſerved after the Death of the Leſſor to any Perſon, who has not the Reverſion after his Death: for as in the former Caſes the Reſervation was void, becauſe there can be no Retribution or Return made to him that gave not the Eſtate; ſo after the Death of the Leſſor, the Rent muſt be reſerved and paid to him who has the Reverſion: for ſince, during the Continuance of the particular Eſtate, the Reverſioner loſes the Profits of the Lands, the Rent, in Equity, ought to be paid to him as a Compenſation for that Loſs.

Therefore if *A.* covenants and grants with *B.* that he ſhall have and enjoy Black Acre for 6 Years, and *B.* covenants Cro. Car. 207.

nants to pay *A.* his Heirs, Executors, Adminiſtrators and Aſſigns, an annual Rent during the Term; this, as is ſaid, being a good Reſervation of a Rent, ſhall, upon the Death of *A.* be paid to the Heir who has the Reverſion, as a Retribution for the Profits of the Land, which he cannot enjoy during the Term: And the Executor of *A.* ſhall never have any thing by virtue of the Covenant, tho' it be in expreſs Words granted to *A.* and his Executors, Adminiſtrators, *&c.* So if *A.* makes a Leaſe, reſerving Rent to him, his Executors and Aſſigns, and dies, that Rent is determined; for the Executors cannot have it for the former Reaſon, being Strangers to the Reverſion, which is an Inheritance: And therefore, they being never to enjoy the Profits of the Land after the Expiration of the Term, can never have a Right to the Retribution, or Compenſation for them.

Co. Lit. 47. a. 2 Rol. Ab. 450.

If a Biſhop leaſes for Years, reſerving Rent, *Proviſo quod Tempore Vacationis dicti Epiſcopatûs, reditus prædictus, ſecundum Ratam Temporis, ſolvitur* Capitulo *Eccleſiæ Cathedralis dicti Epiſcopatûs*, with

with a Clauſe of Re-entry to the Succeſſor for non-payment of the Rent; the *Chapter*, being never to come into the Succeſſion of the Lands belonging to the *See*, can have no Right to a Return of Service from the Leſſee.

If there be two Joint-tenants, and they make a Leaſe by *Parol* or Deed *Poll*, reſerving Rent to *one* only, yet it ſhall enure to both; but if the Leaſe had been by Deed *indented*, the Reſervation ſhould have been good to him only to whom it was made, and the other ſhould have taken nothing. The Reaſon of the Difference is this; where the Leaſe is by Deed Poll or Parol, the Rent ſhall follow the Reverſion, which is *jointly* in both Leſſors: And the rather, becauſe the Rent being ſomething given the Joint-tenant to whom it is reſerved in Retribution for the Land, he ought to be ſeiſed of the Rent in the ſame Manner he is of the Land demiſed, which is *equally* for the Benefit of his Companion and himſelf: But where the Leaſe is by Deed indented, they are *eſtopped* to claim the Rent in any other Manner than it is reſerved by the

2 Rol. Ab. 447. Co. Lit. 47. a. 1 Vent. 161, 162, 163.

the Deed; becauſe the Indenture is the Deed of each Party, and no Man ſhall be allowed to recede from his own ſolemn Act.

By what *Words* the Rent reſerved may be continued to thoſe who are to have the Reverſion after the Death of the Leſſor.

Difference between a general and particular Reſervation.
Co. Lit. 47. a.
2 Rol. Ab. 450, 289.
2 Sand. 369.
Dyer 45.
Hard. 95.
Latch 101.
1 Vent. 162.
Dyer 45.

And here firſt is obſervable the Difference, between a *general* Reſervation without mentioning any Perſon in certain to whom the Rent ſhall be paid; and a *particular* Reſervation to the Leſſor, without mentioning any *other* Perſon to whom it ſhall be paid: for where the Reſervation is *general*, the Rent ſhall be carried over to the Perſon which ſhould have ſucceeded in the Eſtate, if no ſuch Leaſe had been made: But where the Reſervation is particular, as *to the Leſſor*, without going any further, there the Rent ſhall determine with his Death, tho' the Leaſe upon which it is reſerved be ſtill continuing. As for Inſtance, *A.* makes a Leaſe for Years, reſerving a certain Rent, *without ſaying* to the *Leſſor or*

his Heirs; yet this general Reſervation ſhall carry the Rent, not only to the Leſſor, but even to his Heirs that ſucceed in the Reverſion, becauſe the Rent is reſerved as a Retribution or Compenſation for the Land demiſed; and therefore ought, from the Nature of the Contract, to be of equal Duration with the Demiſe:—But if *A.* had made a Leaſe, reſerving a certain Rent to himſelf, this Rent ſhall determine by his Death; becauſe, having reſerved it expreſly to himſelf, he has thereby determined how long the Reſervation ſhall continue; and therefore it ſhall never be carried farther than that Period of Time to which the Leſſor himſelf has fixed it.

But if he only reſerves it to himſelf, it ends at the Leſſor's Death.

So if the Leaſe had been made by *A.* yielding and paying to him and his *Aſſigns* yearly, the Rent of 10 *s.* this Rent ſhall likewiſe determine by his Death, and his Heir ſhall never have it; becauſe there are no Words to carry it to the Heir, who is to have the Reverſion; and the Leſſor having expreſly limited it to himſelf, has thereby determined it to his own Life.

So if he reſerves to him and his Aſſigns, the Rent ends at his Death. Latch 274. 1 Vent. 162, 163. 2 Rol. Ab. 450. Co. Lit. 47. Cro. Car. 290. 2 Lev. 13.

So to him, his Executors, or to him, his Executors or Aſſigns. 2 Rol. Ab. 450. 47. a.

So if the Reſervation had been made to *the Leſſor and his Executors*, or to *him, his Executors or Aſſigns*, in theſe Caſes the Rent determines with the Life of the Leſſor:—for the Executors cannot take the Rent, becauſe if it be continued beyond the Life of the Leſſor, it muſt be carried over to him that muſt ſucceed in the Eſtate, and that is the Heir at Law:—the Heir cannot take, becauſe there are no Words in the Deed to carry it to him.

1 Vent. 161. A Termor reſerving Rent upon his Term to him and his Heirs, the Rent ends at his Death.

So if a Man poſſeſſed of a Term of 100 Years, makes a Leaſe for 50 Years, reſerving Rent to *him and his Heirs*; this Rent determines at his Death:—for the Heir cannot have it, becauſe he cannot ſucceed in the Eſtate, being a Chattel Intereſt, to which the Rent, if it continues after the Life of the Leſſor, muſt belong:—and the Executors cannot have it, becauſe there are no Words to carry it to them.

But if a Man ſeiſed of Lands in Fee makes a Leaſe for Years, reſerving Rent to *him and his Aſſigns during the Term*; this

this Reſervation ſhall not determine by the Death of the Leſſor, but the Rent ſhall go to his Heir: for tho' there be no Mention of his Heirs in the Reſervation, yet there are Words which evidently declare the Intention of the Leſſor to be, that the Payment of the Rent ſhall be of equal Duration with the Leaſe, the Leſſor having expreſly provided that it ſhall be paid *during the Term*; conſequently the Rent muſt be carried over to the Heir, who comes into the Inheritance after the Death of the Leſſor, and would have ſucceeded in the Poſſeſſion of the Eſtate, if no Leaſe had been made. And, if the Leſſor aſſigns over his Reverſion, the Aſſignee ſhall have the Rent as incident to it, becauſe the Rent is to continue during the Term; therefore the Rent muſt follow the Reverſion, ſince the Leſſor made no particular Diſpoſition of it ſeparate from the Reverſion.

A Rent reſerved to the Leſſor and his Aſſigns, during the Term, ſhall go to the Heir. Latch 99, 100, 101. 1 Vent. 163. 2 Rol. Ab. 451. Same Caſe ill reported to the Con'.

If a Leaſe be made for Years, reſerving Rent *during the Term* to the *Leſſor, his Executors and Aſſigns*, this, by the Judgment of *Richmond* v. *Butcher*'s Caſe, determined upon the Death

Cro. Eliz. 217. 1 Vent. 161, 162, 163. 2 Sand. 367. Raym. 213. 2 Lev. 13. 5 Co. 112. a.

of the Leſſor, and did not go to the Heir: But this Judgment has ſince been overthrown, by the Authority of the Caſe of *Sacheverell* v. *Frogate*; becauſe, the Reſervation being to the Leſſor and his Aſſigns *during the Term*; (for the Words Executors, *&c.* are void, the Leſſor having the Inheritance,) ſuch expreſs Words evidently diſcover the Intention of the Contract, and that the Leſſee agreed and bound himſelf to the Payment of the Rent during the Continuance of the Demiſe.

1 Vent. 162. So, for the ſame Reaſon, if a Termor for 50 Years leaſes for 25 Years, reſerving Rent to *him and his Heirs during the Term*; the Executors ſhall have the Rent after the Death of the Leſſor.

Cro. Eliz. 644. Darrel v. Wilſon. If *A.* grants a Rent Charge to *B.* for 40 Years, with a Clauſe of Diſtreſs to *B.* and his Heirs during the Term, the Executors of *B.* may diſtrain for it during the Term: for the Diſtreſs is expreſly given during the Term, and therefore muſt belong to the Executor, who has a Right to the Rent Charge, being a Chattel Intereſt.

If *A.* makes a Leaſe, reſerving Rent to *him* OR *his Heirs*, this is a good Reſervation during the Life of *A.* but void to his Heirs: becauſe the Reſervation being to him *or* his Heirs, in the *Diſjunctive*, both cannot take it; and the Word *Heirs* cannot be a Word of Limitation, becauſe if they are to take at all, they muſt take *originally*; for if the Rent veſts in the Leſſor, it cannot afterwards go to the Heirs, for that would be contrary to the Words of the Reſervation, which limited the Rent either to go to the Leſſor *or* his Heirs, but not to both of them.

A Rent to a Man, or his Heirs, good only during the Leſſor's Life. Co. Lit. 214. Vent. 163. Co. 112.

But it has been adjudged, that where an Abbot made a Leaſe, rendering Rent to *him* OR *his Succeſſors during* the *Term*, that this Reſervation was good to the Succeſſor after the Death of the Leſſor: becauſe here, by the expreſs Words of the Deed, the Rent is made payable during the Continuance of the Term; and therefore, as *incident* to the Reverſion, muſt go in Succeſſion with the Inheritance; and for this Reaſon the Succeſſor of the Abbot, or Aſſignee of the

An Abbot makes a Leaſe, reſerving Rent to him *or* his Succeſſor during the Term; this good to the Succeſſors. 5 Co. 111, 112. Maliorie's Caſe. Cro. Eliz. 805, 832. 1 Vent. 148, 163.

Reverſion, muſt neceſſarily have it; for the Rent being but a Retribution for the Land, none can have a Right to it, but thoſe who would have ſucceeded in the Eſtate of the Land for which the Retribution is given, if it had never been leaſed.

Hard. 89 to 96. 1 Vent. 162.

If Tenant in Tail *ſpecial* leaſes for Years, reſerving Rent to *him, his Heirs and Aſſigns*; this Rent ſhall go with the Reverſion to the ſpecial Heir in Tail, tho' it be reſerved to the Heirs general: for the Word *Heir* ſhall be taken in what Senſe ſhall beſt anſwer the Nature of the Contract; which is, that thoſe who would have ſucceeded in the Eſtate if the Leaſe had never been made, ſhall enjoy the Rent, as the Retribution given them for Want of the Land during the Leaſe.

8 Co. 69 b. 70, 71.

If there be Tenant for Life with ſeveral Remainders over, ſo ſettled by Limitation of Uſes, with a Power to Tenant for Life to make Leaſes, who makes a Leaſe reſerving Rent to *him, his Heirs and Aſſigns*; this is a good Reſervation, and ſhall go to thoſe in Remainder:

Remainder: for when the Tenant for Life makes a Leaſe purſuant to ſuch Power given him by the Settlement, ſuch Leſſee derives his Eſtate out of the Inheritance, which before the Settlement was in the Tenant for Life; and the Settlement being by ſuch Conſtruction of Law ſubſequent to the Eſtate of the Leſſee, thoſe in Remainder to the Tenant for Life are his Aſſignees, to whom the Rent, by the expreſs Words of the Leaſe, is reſerved and limited after the Death of the Tenant for Life.

So if the Reſervation had been in this Caſe to the *Leſſor, and to every Perſon to whom the Reverſion and Inheritance of the Land belongs during the Term*; this is a good Reſervation to thoſe in Remainder; and the Law, in ſuch a Caſe, will diſtribute the Rent according to the ſeveral Intereſts under the Settlement: But Lord *Coke* ſays, that the ſureſt Way is, for Tenant for Life to reſerve the Rent *annually during the Term*; and then the Law diſpoſes of it as incident to the Reverſion. 8 Co. 71. b.

Co. Lit. 12 b. If a Man ſeiſed of Lands of the *Part* of the *Mother*, makes a Leaſe for Life, or Gift in Tail, reſerving Rent to *him and his Heirs*; this Rent ſhall go, with the Reverſion, to the Heirs of the Part of the Mother: becauſe the Nature of the Contract is ſuch, that the Retribution ſhould go to thoſe that loſe the Profit of the Lands during the Leaſe or Gift.

Co. Lit. 12 b. But if he had made a *Feoffment in Fee*, reſerving Rent to *him and his Heirs*; the Rent ſhall go to the Heir of the *Part* of the *Father*: becauſe here is an intire Diſpoſition of the Land, and the Rent is in the Nature of a new Purchaſe, coming in to the Family from the Grant of the Feoffee; and therefore the Blood of the Father ſhall be preferred.

V. Of

V. Of the ſeveral *Remedies for the Recovery of Rents:* but before this is ſhewn, it will be neceſſary to take Notice of ſome Things that muſt be done by the Perſons that are to purſue theſe Remedies before they can recover by them. And here is to be conſidered; 1ſt. In what Caſes a *Demand* is neceſſary. 2dly, At what *Place* and *Time* ſuch Demand muſt be made.

I. In what Caſes a Demand is neceſſary.

And here the material Difference is obſervable between a Remedy by *Re-entry*, and a Remedy by *Diſtreſs*, for the non-payment of Rent. For where the Remedy is by Way of *Re-entry* for non-payment, there muſt be an *actual Demand* made *previous* to the Entry, otherwiſe it is *tortious:* becauſe a Condition of Re-entry is in *Derogation* of the *Grant*, and the Eſtate at Law, being once defeated, is not to be reſtored

Co. Lit. 201. b. Hob. 207, 331. Dy. 51. b. Plow. 70. Vaug. 32. 7 Co. 28. b. Co. Lit. 202.

ſtored by any ſubſequent Payment; and it is preſumed, that the Tenant is there reſiding on the Premiſſes, in order to pay the Rent, for the Preſervation of his Eſtate, unleſs the contrary appears by the Leſſor being there to demand it: And therefore, unleſs there be a *Demand* made, and the Tenant thereby, contrary to the Preſumption, appears not to be upon the Land ready to pay the Rent, the Law will not allow the Leſſor the Benefit of *Re-entry*, to defeat the Tenant's Eſtate, without a wilful Default in him; which cannot appear without a *Demand* hath *actually* been made upon the Land.

Hut. 114. Hob. 207, 331. Hanſon v. Norcliff. 7 Co. 28. b. Hut. 42. Hob. 82, 133.

So it is, if there be a *Nomine Pœnæ* given to the Leſſor for non-payment, the Leſſor muſt *demand* the Rent, before he can be intitled to the *Penalty*: Or if the Clauſe had been, that if the Rent were behind, that the Eſtate of the Leſſee ſhould ceaſe and be void: in theſe Caſes there muſt be an *actual Demand* made, becauſe the Preſumption is, that the Leſſee is attendant on the Land to ſave his Penalty, and preſerve his Eſtate; and therefore ſhall not be puniſhed,

puniſhed, without a wilful Default: and that cannot be made appear, without a Demand be proved, and that it was not anſwered. And the Demand in theſe Caſes muſt be made on the Day *prefixed* for the Payment, and alledged expreſly, to have been made, in the *Pleading*.

A Rent Charge may be diſtrained for without a Demand. Hob. 207.

But where the Remedy for Recovery of the Rent is by *Diſtreſs*, there needs no *Demand previous* to the Diſtreſs; tho' the Deed ſays, "that if the "Rent be behind, being lawfully de-"manded, that the Leſſor may diſ-"train:" But the Leſſor, notwithſtanding ſuch Clauſe, may diſtrain when the Rent becomes due. So it is if *A.* has a Rent Charge, and if it be behind, being lawfully demanded, that then *A.* ſhall diſtrain, he may nevertheleſs diſtrain without any *previous Demand:* becauſe this Remedy is not in *Deſtruction* of the Eſtate; for the Diſtreſs is only a *Pledge* for the Payment of it; and the very *taking* of a Diſtreſs is a *legal Demand* to the Tenant to pay the Rent, which is all that was required by the Deed: And the Tenant is not injured by the taking of the

the Diſtreſs; becauſe upon the *Tender* of the Rent, the Pledges are immediately reſtored, or a Writ of *Detinue* lies, after the *Quantum* of the Rent has been ſettled in *Replevin*. Whereas in the Caſe of Re-entry, or of the Penalty, the Tenant is really injured, either by the Loſs of his Eſtate, or the Payment of a greater Sum than the Rent, which cannot be reſtored upon the Payment of the Rent: And therefore he ſhall not be puniſhed in ſuch Caſes, without a wilful Default in him, which cannot otherwiſe appear, than by the Proof of a Demand not anſwered by the Tenant.

Upon Tender of the Rent, the Pledges muſt be immediately reſtored; or elſe a Writ of Detinue lies.

Exception 1. The *King* need make no Demand. 5 Co. 56. 4 Co. 73. Latch 28. Moor 152.

But this general Diſtinction muſt be underſtood with theſe Reſtrictions:— Firſt, that if the *King* makes a Leaſe, reſerving Rent, with a Clauſe of Re-entry for non-payment, the King is not obliged to make any *Demand* previous to his Re-entry; but the Tenant is obliged to pay the Rent, for the Preſervation of his Eſtate: becauſe it is beneath the royal Dignity of the Crown to attend a Subject to demand the Rent; but the *Law*, for the Support of that Dignity,

Dignity, obliges every private Perſon to attend the King, with the Services due to him.

But this Exception is not to be extended to the *Dutchy* Lands, tho' they be in the Hands of the King; for the King, in this Caſe, muſt make a Demand before he can enter into ſuch Lands. But this is by the Statute of 1 *Hen.* 4. which provides, that when the Dutchy Lands come to the King, they ſhall not be under ſuch Government and Regulation as the Demeſnes and Poſſeſſions belonging to the Crown are: for the Act ſays, *quod taliter modo, et per tales officiarios vel miniſtros gubernentur, etſi ad Culmen Dignitatis Regiæ aſſumpt' minime fuiſſent:* So that by this Act they are to be conſidered as if they were in the Hands of a Subject; and conſequently a Demand neceſſary. But if the King, in Caſes where he *need not* make a Demand, *aſſigns* over the Reverſion, the *Patentee* cannot enter for non-payment without a Demand previous: becauſe the Privilege is *inſeparably* annexed to the *Perſon* of the King, for the Support of his royal Dignity;

But the King muſt make a Demand before he can re-enter into the Dutchy Lands for non-payment of Rent. Moor 149 to 154.

A Patentee ſhall not enter for non-payment, without a previous Demand: 4 Co. 73. a. Moor 404. Cro. Eliz. 462.

nity; and therefore ſhall not be extended to Caſes where the King is no Way concerned.

Exception 2. Where Rent is payable off the Land at a certain Place, or to be lawfully demanded of the Perſon who is to pay it; in both theſe Caſes a Demand muſt be made before they can diſtrain.

Secondly; Another Exception is, where the Rent is payable at a *Place* off the Land, with a Clauſe, that if the Rent be behind, being lawfully demanded at the *Place* off the Land;—or where the Clauſe is, that if the Rent be behind, being lawfully demanded of the *Perſon* that is to pay it, that then he may diſtrain: in theſe Caſes, tho' the Remedy be by Diſtreſs only, yet the Grantee cannot diſtrain without a *previous Demand*; becauſe here the *Diſtreſs* and the *Demand* being not one *complicated*, but *different* Acts, to be performed at different *Places* and *Times*, the Demand muſt be previous to the Diſtreſs; for the Diſtreſs is an Act of Agreement between the Parties, and not of common Right, and therefore muſt be uſed in the Manner that it is given; for *cujus eſt dare ejus eſt diſponere.*

Where the Diſtreſs is given by Law, no Demand neceſſary.

When a Diſtreſs is given by *Law*, it appoints *where* it ſhall be *taken*, but requires no Demand previous to it; becauſe

becauſe it conſiders the Diſtreſs itſelf as a *Demand:* and if it were otherwiſe, the Tenant might elude his Lord, by driving off the Beaſts. But where the Diſtreſs is given by the *Agreement* of the Parties, and the Place which the Law appoints is altered by the Agreement of the Parties, then a Demand is neceſſary to be made to intitle to the Diſtreſs; becauſe both the Diſtreſs and the Demand ariſe from the Agreement of the Parties, and by Conſequence the Demand muſt be previous, according to the Stipulation.

Secus if given by the Agreement of the Parties.

But where the Clauſe is no more, than that if the Rent be behind, being lawfully demanded, without ſaying at any *Place* off the Land, or of the *Perſon* of the Grantor, that then the Grantee may diſtrain, there needs no *actual* Demand: becauſe here the Diſtreſs and Demand is but one *complicated Act*, the one included in the other, and all done at one Time and Place, *viz.* upon the Land; for the Diſtreſs is in itſelf a lawful Demand, and therefore there needs no actual Demand previous to it: becauſe all that was required by the Deed was a lawful

2 Rol. Ab. 426. Hob. 208. Licet Dy. al con. 348.

Demand, which the Diſtreſs in its own Nature is.

There ſeems formerly to have been another Exception admitted, that where the Remedy was by Way of *Entry for non-payment*, that yet there needed no Demand, if the Rent were made payable at any *Place* off the Land: becauſe they looked upon the Money, payable off the Land, to be in the Nature of a Sum in *Groſs*, which the Tenant had at his own Peril undertaken to pay. But this Opinion has been intirely exploded, for the Place of Payment does not alter or change the Nature of the Service; but it remains a Rent as much as if it had been made payable upon the Land: and therefore the Preſumption is, that the Tenant was there to pay it, unleſs it be overthrown by the Proof of a Demand: and without ſuch a Demand, and Neglect, or Refuſal thereupon, there is no Injury done to the Leſſor; and conſequently the Eſtate of the Leſſee ſhall not be defeated or determined.

Plow. 70. Kidwelly's Caſe. 4 Co. 73. a. Moor 408, 598. Cro. Eliz. 415, 535, 536.

Where the Leſſor has a Power to Re-

But where the Power of Re-entry is given to the Leſſor for non-payment of Rent,

Rent, *without any further Demand*; here it ſeems that the Leſſee has undertaken to pay it whether it be demanded or not, and there can be no Preſumption in this Caſe in his Favour, becauſe, by diſpenſing with the Demand, he has put himſelf under the Neceſſity of making an actual Proof that he was ready to tender and pay the Rent.

enter for non-payment of Rent without any farther Demand, the Leſſee has undertaken it at his Peril.

Another Exception, where the Remedy is by Diſtreſs, is, that where the Tenant was ready on the Land to pay the Rent at the Day, and made a Tender of it, there it ſeems there muſt be a Demand previous to the Diſtreſs; becauſe, where the Tenant has ſhewn himſelf ready on the Day by the Tender, he has done all that can in Reaſon be required of him: for it would put the Tenant to endleſs Trouble, to oblige him every Day to make a Tender, it being altogether uncertain when the Leſſor ſhall come for his Rent, when he has omitted the Day which he himſelf appointed by the Leaſe for Payment and Receipt thereof; as the Leſſee muſt expect the Leſſor, and be ready to pay

A Tender on the Land the Day the Rent became due, or if the Leſſor lapſe the Day of Payment, the Leſſor muſt make a Demand before he can diſtrain. Hob. 207. 2 Rol. Ab. 427.

it at the Day appointed for Payment of it, or elſe the Leſſor may diſtrain for it without any Demand: So, where the Leſſor has *lapſed* the Day of Payment, and was not on the Land to receive the Rent, he muſt give the Tenant Notice to pay it before he can diſtrain for it; becauſe the Tenant ſhall be put to no Trouble where it appears that he has omitted nothing on his Part.

Hob. 207. A Tender on the Land on the Day, there a Demand on the Land is ſufficient to maintain a Diſtreſs.

And where the Tender was made by the Tenant only *on the Land* at the Day, there a Demand *on the Land* is ſufficient to juſtify a Diſtreſs after the Day; becauſe the Demand is of equal Noterity with the Tender: and, by a Parity of Reaſon, the Tenant ought to take Notice of ſuch Demand, as well as the Leſſor of the Tender on the Land.

Hob. 207. 2 Rol. Ab. 427. But if the Tender was to the Perſon of the Leſſor, the Demand muſt be to the Perſon of the Leſſee.

But if the Tenant had tendered the Rent on the Day to the Perſon of the Leſſor, and he refuſed it; it ſeems, by the better Opinion, that the Leſſor cannot diſtrain for that Rent without a Demand of the *Perſon* of the Tenant; becauſe the Demand ought to be equally notorious

notorious to the Tenant, as the Tender was to the Lord.

So if the Service by which the Tenant holds be *perſonal*, as by *Homage* or *Fealty*, the Demand muſt be of the Perſon of the Tenant: becauſe this Service is only performable by the very Perſon of the Tenant; and therefore a Demand where he is not, would be improper. Hob. 207. Hut.

Again, if the Rent be *Seck*, and the Tenant be ready, at the laſt Inſtant of the Day of Payment, to pay the Rent, and the Grantee is not there to receive it, he muſt afterwards demand it of the Perſon of the Tenant, on the Land, before he can have his *Aſſize*: becauſe the Tenant, by the Tender at the Day, has done all that was required on his Part; and if the Grantee might have his *Aſſize*, after ſuch Tender on the Day, without a Demand of the Perſon, the Tenant might be made a Diſſeiſor, and Damages for the Diſſeiſin laid upon him, without any wilful Default in him: But in the Caſe of a Rent Charge, after ſuch Tender of the Tenant's on the Land, the Grantee may demand afterwards the

7 Co. 29. a. Hob. 207. 2 Rol. Ab. 427, 428. Cro. Car. 508.

Where a Tender has been made of a Rent Seck, the Demand muſt be perſonal.

Secus of a Rent Charge, if the Tender was made on the Land.

Rent upon the Land; becauſe he has his Remedy by Diſtreſs, which is no more than a Pledge for the Rent, and this not being to be found and taken off the Land, the Grantee need only to demand his Rent where he can find his Remedy, which is upon the Land: But in this Caſe, if the Grantee cannot find the Tenant on the Land to demand the Rent, he may, at the next Feaſt on which the Rent is payable, demand all the Arrears on the Land; and if the Tenant be not there to pay it, he has failed of his Duty, and is guilty of a wilful Default, which amounts to a Denial; and that Denial being a *Diſſeiſin* of the Rent, the Grantee may have his *Aſſize*, and by that ſhall recover all the Arrears.

Neither a Tender by a Leſſee of a Rent Seck at the Day, nor a Demand by the Grantee, yet it is ſufficient if a Demand is made on the Land to bring an Aſſize.

But if there has been neither a Tender of the Tenant, nor a Demand of the Grantee, on the Day, there the Grantee may afterwards demand the Rent on the Land: becauſe, the Tenant, having omitted to do his Duty by a Tender on the Day, is ſtill obliged to anſwer the legal Demand of the Grantee, which is well made upon the Land;

Land; becauſe the Rent iſſues thereout: for when there is no Tender on the Day of Payment, the Rent is due, and payable every Day afterwards, and therefore a Demand in the ſame Manner as the Law requires is ſufficient; and conſequently the non-payment, after a Demand on the Land, is a Denial and Diſſeiſin for which the Grantee may have his Aſſize.

7 Co. 29. a. 2 Rol. Ab. 427. Lit. Sect. 233.

If a Leaſe be made reſerving Rent, and a *Bond* is given for Performance of *Covenants*, and *Payment* of the *Rent*, the Leſſor may ſue the Bond without demanding the Rent; for the Bond being only a *collateral* Security for the Rent, makes no Alteration in the Nature of it, but it muſt ſtill be paid in the ſame Manner, and at the *ſame Time* and *Place*, as if there were no Bond given; and therefore is ſubject to the former Rule and Diſtinction as to the Demand.

A Bond given as a collateral Security for Payment of Rent, if no Tender made on the Day, the Bond may be ſued without Demand. Hob. 8. Cro. Car. 76. Chapman v. Chapman. Cro. Eliz. 332.

If there be *ſeveral Things* demiſed in one Leaſe, with *ſeveral* Reſervations, with a Clauſe, that if the ſeveral yearly Rents reſerved be behind or unpaid, in

Several Demiſes and ſeveral Reſervations, and if the Rent be behind in Part or in all, a

Clauſe of Re-entry to the Leſſor, ſeveral Demands muſt be made. Vaugh. 71, 72.

Part or in *all*, by the Space of one Month after any of the Days at which the ſame ought to be paid, that then it ſhall be lawful for the Leſſor, into ſuch of the Premiſſes, whereupon ſuch Rents being behind is or are reſerved, to re-enter; theſe are in the Nature of *diſtinct* Demiſes and *ſeveral Reſervations*, and conſequently there muſt be *diſtinct* Demands on *each* Demiſe, to defeat the whole Eſtate demiſed.

A Leaſe for Years ſo long as the Leſſee ſhall pay the Rent, or quamdiu ſola fuerit, is a Limitation, and not a Condition. Vaugh. 31, 32. Triſtraine v. Counteſs of Baltinglaſs.

Secondly, as to the *Neceſſity of the Demand of the Rent*; there is a Difference between a *Condition* and a *Limitation*: for Inſtance; If Tenant for Life (as the Caſe was by Marriage Settlement,) with Power to make Leaſes for 21 Years, *ſo long as the Leſſee his Executors or Aſſigns ſhall duly pay the Rent reſerved*, makes a Leaſe purſuant to the Power, the Tenant, at his Peril, is obliged to pay the Rent, without any Demand of the Leſſor: becauſe the Eſtate is *limited* to continue only ſo long as the Rent is paid; and therefore, for the non-performance according to the Limitation, the

the Eſtate muſt determine: As if an Eſtate be made to a Woman *dum ſola fuerit*, this Word *dum* is a Word of Limitation which determines her Eſtate upon her Marriage.—*Note* that it is the better Way for the Leſſor to have a Clauſe of *Re-entry* for non-payment of the Rent, than a Clauſe for the Leaſe to be *void*; becauſe there is no Re-entry previous to determine an Eſtate already void in itſelf: yet even in this Caſe, if the Leſſor forbears to make an actual Demand when the Rent is in Arrear, he may recover it by an Action of *Debt*, or *Diſtreſs*, and ſo continue the Leaſe; becauſe, thoſe Remedies not being in *Defeaſance* of the Grant, the Leſſor may purſue them without an actual Demand, as is already obſerved.

Hob. 331. Bro. Ab. 429.

II. Of the *Place*, and *Time*, *where*, and *when*, the Rent muſt be demanded.

Of the Place of Demand.

And here again we muſt obſerve the Difference between Remedy by *Re-entry* and *Diſtreſs*. For where the Rent is reſerved upon Condition, that if it

Co. Lit. 153. a. 201. b. 2 Rol. Ab. 428.

be behind, the Leſſor may enter; in ſuch Caſe the Demand muſt be upon the moſt *notorious* Place on the Land: and therefore, if there be a *Houſe* on the Land, the Demand muſt be made at the *fore Door* thereof, becauſe the Tenant is preſumed to be there reſiding; and the Demand being required to give Notice to the Tenant, that he may not be turned out of his Poſſeſſion without a wilful Default; ſuch Demand ought to be in a Place where that End and Intention will be beſt anſwered.

Daliſon 59. a. Co. Lit. 201. b. And. 27. 3 Leon. 4. Licet Cro. Eliz. 15. al con'.

A Rent Seck granted out of *A.* payable out of *B.* may be demanded at either Place. Cro. Ja. 507, 508. Smith v. Smith. Cro. Eliz. 334. Ben. and Dal. 59. 2 Rol. Ab. 428.

If a Rent *Seck* be granted out of *A.* payable at *B.* the Grantee may demand it at *A.*; and if the Tenant be not there to pay it, this is a Diſſeiſin, for which the Grantee may have his *Aſſize:* and a Demand at *B.* had been likewiſe good; becauſe that, by the expreſs Appointment of the Parties, was the Place where the Rent was made payable; and therefore a fit Place to demand it.

A Demand of the Perſon of the Tenant off the Land not good.

But a Demand of the *Perſon* of the Tenant is not ſufficient *off* the Land, becauſe the Demand is required to be in order to an immediate Payment; but

no

no Perſon is preſumed to carry his Wealth about him, for that is reaſonably ſuppoſed to be at the Place of his Habitation, or upon the Land from which it is gathered; and therefore the Demand of the Perſon *off* the Land, being not ſufficient to anſwer the Intention of the Demand, is uſeleſs and inſignificant.

Cro. Car. 521. Co. Lit. 153. Lit. Sect. 233.

If the *Queen* makes a Leaſe, reſerving Rent, the Tenant muſt pay it without Demand, as is ſaid, either to her Receiver for that Purpoſe, or at the Receipt of the Exchequer, as well as if, by the Words of the Leaſe, the Rent had been made payable at her Exchequer, or into the Hands of her Receiver. But if the Queen grants the Reverſion, the *Patentee* muſt demand the Rent upon the Land; becauſe that is the Place appointed by Law, for the Reaſons already given, for a common Perſon to demand the Rent.

A Rent reſerved by the Queen muſt be paid to her Receiver, or at the Exchequer, without Demand. 4 Co. 73. Co. Lit. 201. b. Cro. Eliz. 462. Moor 404. But the Patentee muſt demand it on the Land.

If it were reſerved payable at the Church of *S. or D.*, upon Condition; it ought to be demanded at both Places: becauſe the Leſſee has his Election to pay

Where payable at *S.* or *D.* the Leſſor muſt demand it at both Places. 2 Rol. Ab. 428.

pay it at either Place: and therefore, to take Advantage of the Condition, the Leſſor muſt demand it in ſuch Place where, by his own Agreement, he has permitted the Tenant to pay it.

2 Rol. Ab. 428. So if it had been to be demanded *at* or *in* the Church of *D.*; it ought, for the ſame Reaſon, to be demanded *within* and *without* the Church.

Dy. in Margin 329. If a Leaſe be made of two *Barns* rendering Rent, with a Condition of Re-entry for non-payment, the Leſſee tenders the Rent at one Barn, and the Leſſor demands it at the other, yet the Leſſor cannot re-enter; becauſe one Barn being as *notorious*, and conſequently as proper a Place as the other for the Payment, it is preſumed, that the Leſſee was in the proper Place for Payment, unleſs the Preſumption be overthrown by a Demand: And therefore, ſince the Demand was not made at both Places, *viz.* at both Barns, there is nothing to deſtroy the Preſumption that the Tenant was not in the *proper Place* ready to pay, to ſave the Condition; and if the Leſſor did not demand it at the proper Place,

Place, he ſhall not take Advantage of the Condition.

Of the *Time* for Payment.

The Time for Payment, and conſequently for the Demand, is ſuch a convenient Time, before the *Sun-ſetting* of the *laſt Day*, as will be ſufficient to have the Money counted: but if the Tenant meet the Leſſor on the Land at any Time on the laſt Day of Payment, and tender the Rent, that is a ſufficient Tender, becauſe the Money is to be paid, *indefinitely*, on that Day; and therefore a Tender on the Day is ſufficient. Co. Lit. 202. a. 2 Rol. Ab. 408. Daliſon 114.

If a Leaſe be made, reſerving Rent, upon Condition that if the Rent were behind at the Day, and ten Days after, being in the *mean while* demanded, and no Diſtreſs to be found upon the Land, that the Leſſor may re-enter; if the Rent be behind at the Day, and ten Days after, and a ſufficient Diſtreſs be upon the Land till the Afternoon of the tenth Day, and then the Leſſee takes away his Cattle, and the Leſſor demands the Cro. Eliz. 63. Woſter v. Stone.

the Rent, at the laſt Hour of the Day, and the Leſſee did not pay it, nor was there any Diſtreſs upon the Land, yet the Leſſor could not enter, becauſe he made no Demand in the *mean Time*, between the Day of Payment, and the ten Days, which by the Clauſe he was obliged to do.

Of the *Remedies* for the Recovery of Rent.

Remedies for the Recovery of Rent provided by Law.

The Remedies for the Recovery of Rent are either by the *Proviſion* of the *Law*; or by the *Appointment* of the *Parties*.

Diſtreſs the firſt Remedy.

The principal *Remedy* which the *Law* hath appointed for the Recovery of a *Rent Service* is a *DISTRESS*; and this we have already obſerved to have been borrowed from the Civil Law: for, by the antient Feudal Law, the Non-performance of the Service was a Forfeiture of the Feud; and when the Severity of that Law came to be mitigated, they allowed, that all the *Inducta et Illata* might be ſeiſed as Pledges, to anſwer the Services reſerved upon

upon the Feudal Contract: and therefore this Remedy by Diſtreſs was allowed for the Recovery of the Rent Service due on a Leaſe at Will, as well as upon a Leaſe for Years, for Life, or a Gift in Tail; becauſe the Feud itſelf being originally granted at Will, the Forfeiture for non-payment muſt, with more Reaſon, have been extended to ſuch precarious Eſtates, which the Lord might have determined by his Pleaſure, without any wilful Default in the Tenant.

Rent Service on a Leaſe at Will, &c. may be diſtrained for. Lit. Sect. 72. Co. Lit. 57.

Another Remedy which the Law gives for the Recovery of Rents, is the Action of *Debt*, for Rent reſerved upon a Leaſe for Years; but this extended not to *Freehold* Rents, and the Reaſon is this: — Actions of Debt were given for Rents reſerved upon Terms for Years; for that, ſuch Terms being of ſhort Continuance, it was not neceſſary that the Leſſor ſhould follow the Chattels of his Tenant wherever they went, or whereever he ſhould remove them: But when the Rents were reſerved upon the *durable* Eſtate of the Feud, the Feud itſelf,

Action of Debt the 2d Remedy for Rent upon a Leaſe for Years.

itſelf, and the Chattels thereupon, were pledged upon it to anſwer the Rent, and the Lord had his *Ceſſavit* to recover the Land itſelf. And hence it is, that if the durable Eſtate of the Feud determines, as if the Leſſee for Life dies, the Leſſor may have an Action of *Debt* for the Arrears; becauſe the Land is no longer a Security for the Rent, and therefore the Chattels of the Tenant were liable to ſatisfy the Arrears in an Action of Debt, wherever the Tenant removed them.

Ceſſavit.

Co. Lit. 62, a.

Co. Lit. 162. a. 4 Co. 49. a.

And ſo it was in Caſe of a *Rent Charge*; for if a Man were ſeiſed of it in Fee, and it was in Arrear, he could have no Action of Debt for the Arrears: and if he died, his Heir could not have any *real* Action for the Arrears, for that is proper for the Recovery of the Poſſeſſion, which is ſtill in him; nor could he have a *perſonal* Action for the Arrears in the Life of the Anceſtor at the ſame Time, for it could not be ſuppoſed to be both a *real* and *perſonal* Thing: for this Reaſon alſo, the Executor (who is intitled to the perſonal Eſtate) could not have an Action for the

Arrears; becauſe the Executor could not intitle himſelf by virtue of the Contract that created the Rent, ſince the Heir was conſtituted Repreſentative by the Contract; and by Conſequence that Repreſentation excluded all other Perſons from taking any Benefit as Repreſentative, who did not come under that Character.

By the 8 Annæ an Action of Debt lies for Arrears due on a Leaſe for Life or Lives.

But theſe Inconveniencies and Miſchiefs are now remedied. For now, by the Stat. 8 *Annæ*, it is provided, "That "*whereas no Action of Debt lies againſt* "*Tenant for Life or Lives for any Ar-* "*rears of Rents, during the Continu-* "*ance of ſuch Eſtate for Life or Lives:* "*be it enacted, that from the firſt Day* "*of* May 1710. *it ſhall be lawful for* "*any Perſon or Perſons having any* "*Rent in Arrear, or due upon any* "*Leaſe or Demiſe for Life or Lives,* "*to bring an Action or Actions of* "*Debt for ſuch Arrears of Rent, in* "*the ſame Manner as they might have* "*done, in Caſe ſuch Rent were due,* "*and reſerved upon a Leaſe for* "*Years.*"

And

By the 32 H. 8. the Executor of a Man seised of a Rent Charge, Service or Seck, may either bring an Action of Debt, or distrain for Arrears of Rent due.
Co. Lit. 162.

And by the 32 of *Hen.* 8. the Executor of a Man seised either of a *Rent Charge*, *Rent Seck*, or *Rent Service*, either in Fee-simple or in Tail, *or for life*, have now a *double* Remedy given them for such Arrears, either by Action of *Debt* or *Distress*: the Action of Debt not only lies against the Tenant, that ought to have paid the Rent, but against his Executors and Administrators; — The Distress runs with the Land, as long as it continues in the Possession of the Tenant that suffered the Rent to run in Arrear, or of any other Person claiming by or from him: — And therefore if a Man grants a *Rent Charge* in Fee, and afterwards makes a Feoffment of the Land out of which it issues, and the Feoffee makes a Lease at *Will*, the Executors of the Grantee may distrain the Tenant at *Will* for any Arrears that became due in the Life of the Grantor; because such Tenant claims from the Grantor: and so every Feoffee of the first Feoffee *in infinitum* claiming immediately from the Grantor.

4 Co. 50.
1 And. 178.
4 Lev. 115, 116.

4 Co. 50. b.

So if the Tenant makes a Gift in Tail, and the Donee dies, the Issue is charge-

chargeable with the Arrears of Rent; for tho' he claims by Deſcent *per formam Doni*, yet it is by Virtue of the Gift made by the Tenant.

But if Tenant in Tail makes a Feoffment in Fee, and dies, and the *Diſcontinuee* charges the Land with a Rent in Fee, and then enfeoffs the Iſſue in Tail within Age, ſo as he is *remitted*, the Iſſue is chargeable with none of the Arrears; becauſe being *remitted* by the Feoffment to the old Eſtate Tail, he cannot claim under the Continuance, but from the firſt Donor. 4 Co. 50. b.

So it is if the Tenant dies without Heirs, ſo that the Tenancy *eſcheats* to the Lord, he ſhall not be chargeable with any Arrears of a *Rent Charge* incurred in the Life-time of the Tenant; becauſe he claims by the original Infeudation, which being prior to any Right the Tenant had, the Lord when he comes in by Eſcheat cannot be ſaid to claim by or from the Tenant. For the further Explanation of this Act of the 32 *Hen.* 8. ſee Title Executors under what *Actions they may have.* Co. Lit. 162. b.

Co. Lit. 162. a. But before these Acts, if there had been Tenant for Life of a Rent, and he died, the Rent being in Arrear, his Executors, by the Common Law, might have an Action of Debt for the Arrears; for the Executor, representing the Person of the Testator, succeeds in all his personal Rights: And when the Rent is in Arrear at his Death, it is no more than a single personal Duty distinct and separate from the real Estate, for which there can be no Remedy by real Action, which recovers the Freehold, of which the Possessor was disseised: But the Arrears of Rent being no Freehold, but a perfect Chattel, or single Duty, were recoverable by the Executors, as all other personal Things; and tho' the Freehold determined by the Death of Tenant for Life, yet they did not construe such Duties to cease, because there were no Words in the Contracts to found such a Construction upon; for the Contract gave him the entire Rent during Life, and the Act of God did not take it away.

If

If Tenant *pur auter vie*, or Tenant for Years, held over, yet the Leſſor could not diſtrain them for Rent that became due before the Determination of their reſpective Leaſes, tho' they continued in the Poſſeſſion of the Land afterwards; for when the Leaſe was determined, the Leſſor could not *avow* on them as his Tenants claiming under a Leaſe wich was ended. To remedy this, it is provided by the ſaid Act of the eighth of Queen *Anne*; — That "*Whereas Tenants* pur auter vie, *and* "*Leſſees for* Years, *or at* Will, *frequently held over the Tenements to* "*them demiſed, after the Determination* "*of ſuch, or any other Leaſes, and no* "*Diſtreſs can by Law be made for any* "*Arrears of Rent that grew due on* "*ſuch reſpective Leaſes before the De*"*termination thereof*;—*It is hereby fur*"*ther enacted, by the Authority afore*"*ſaid, that from and after the firſt* "*Day of* May 1710. *it ſhall and may* "*be lawful for any Perſon or Perſons* "*having any Rent in Arrear, or due* "*upon a Leaſe for Life or Lives, or* "*for Years, or at Will,* ended *or* deter-

Tenant for another Man's Life, or for Years, holding over their Terms, may be diſtrained; by the Proviſo of the Stat. of 8 Ann.

" mined, *to diſtrain for ſuch Arrears,*
" *after the Determination of the ſaid*
" *reſpective Leaſes, in the ſame Man-*
" *ner as they might have done, if ſuch*
" *Leaſe or Leaſes had not been ended or*
" *determined:* Provided *that ſuch Diſ-*
" *treſs be made within the Space of* ſix
" Calendar *Months after the* Deter-
" mination *of ſuch Leaſe, and during*
" *the* Continuance *of ſuch Landlord's*
" Title *or* Intereſt, *and during the*
" *Poſſeſſion of the Tenant from whom*
" *ſuch Arrears became due.*"

The Writ of Aſſize; the 3d Remedy by Law for Recovery of Rent.

The next Remedy the Law has provided is the Writ of *Aſſize:* the Nature of this Writ will be explained more at large in another Place; all that ſeems neceſſary to be ſaid of it here is, that it is a Remedy which the Law hath appointed for the *Reſtitution* of the Freehold which is *unjuſtly* with-held and taken away: and therefore, for the better Inquiry in what Caſes an Aſſize lies, we muſt ſee how many Ways a Man may be *diſſeiſed* of a Rent.

What a *Diſſeiſin* of a Rent is, and the different Ways in which it may be made.

Now this ſeems plain, that if I be deprived of the Means by which I am to bring any thing into my Poſſeſſion, I may, in

in all reaſonable Conſtruction, be ſaid to be deprived of the Thing itſelf, ſince without that Uſe of thoſe Means I can never enjoy the Thing itſelf: from whence we may gather theſe Concluſions:

1ſt, That if the Tenant of the Land *incloſe* it ſo that the Lord cannot come on it to diſtrain, this is a *Diſſeiſin*, for which the Lord may have his *Aſſize*; becauſe the Diſtreſs being the Means by which the Lord is to get the actual Poſſeſſion of the Rent, the Incloſure which hinders him from the Diſtreſs, in Conſequence deprives or diſpoſſeſſes him of the Rent; and the *Incloſure* for the ſame Reaſon is a Diſſeiſin of a *Rent Charge*.

Incloſure is a Diſſeiſin of a *Rent Charge*. Lit. Sect. 207, 208.

Incloſure is likewiſe a Diſſeiſin of a *Rent Seck*, but not becauſe the Grantee is thereby deprived of any Diſtreſs, for that Remedy the Grantee has not; but becauſe, by the Incloſures he is *hindered* from coming on the Land to demand the Rent: for ſince the Demand on the Land on the Day, and non-payment by the Tenant, is a Diſſeiſin of the Rent, if the Tenant prevents the

Incloſure is a Diſſeiſin of a *Rent Seck*.

legal Demand of the Grantee, by hindering him from coming on the Land to make it, he has deprived him of the only Means he had of coming at his Rent; and conſequently has diſſeiſed him of it: and this Conſtruction is the more reaſonable, becauſe the Preſumption is the more reaſonable and ſtrong, that the Tenant would not pay it on Demand, when he himſelf prevented the Demand.

If the Tenant *binders* the Landlord from *diſtraining*, or having diſtrained, *reſcues*, this a Diſſeiſin. Lit. Sect. 337.

2dly, If there be no Incloſures, yet if the Lord comes upon the Land, and the Tenant *binders him to diſtrain*;— or if the Lord having taken the Diſtreſs, the Diſtreſs is *reſcued* by the Tenant;— theſe are *Diſſeiſins* of the *Rent Service* and *Rent Charge*: for where the Diſtreſs is reſcued, the Lord is equally deprived of the Means, as if he had been kept off the Land by Incloſures, or hindered to diſtrain when he came upon the Land: Becauſe the Deſign of the Diſtreſs is, by the Pledges to oblige the Tenant to pay the Rent; But that Tie or Obligation ceaſes as much when the Tenant hath recovered his Beaſts without Payment of the Rent, as if they never

ver had been taken: So for the ſame Reaſon it is in the Caſe of a *Rent Charge*. But theſe are no Diſſeiſins of a *Rent Seck*, becauſe the Grantee of a Rent Seck cannot diſtrain for that, and conſequently cannot be deprived of thoſe Means he has not Pretenſions to, either from the Law, or the Act of the Party.

The Rent muſt be due.

But the Rent muſt be *due*, or the Reſiſtance or Reſcue of the Tenant, can be no Diſſeiſin; becauſe no Man can be ſaid to be deprived or diſſeiſed of a Thing, he has no Right to. Beſides, the uſing of the Diſtreſs before the Rent becomes due, is equally unlawful, as if I uſed a Remedy I had no Right to; and conſequently the Tenant is not blameable for the preventing an unlawful Action.

Cattle taken on the Highway, or after Tender of the Rent, the Tenant reſcues, this no Diſſeiſin.

So, if the Rent had been due when the Lord came to diſtrain, and the Tenant had *tendered* the Rent, and notwithſtanding the Lord diſtrained; — or if the Diſtreſs had been taken in the *Highway*, within the Lord's Fee, and the Tenant had made no Tender;—yet in either of theſe Caſes the Tenant may

reſcue, without the Guilt of a Diſſeiſin: becauſe in the firſt Caſe, the Diſtreſs *after the Tender* was unlawful, for he had no Right to thoſe Pledges to inforce the Payment of a Debt which was offered to be paid;—And the Diſtreſs in the *Highway* was unlawful, becauſe prohibited by the Statute, that being a Place privileged for the Encouragement of Commerce;—and conſequently, the Reſcue cannot be ſaid to be a depriving the Lord of Means which he had no Right to make uſe of: And ſo it is in the Caſe of every unlawful Diſtreſs.

Replevin a Diſſeiſin of a *Rent Service* and *Rent Charge*. Lit. Sect. 237, 238.

3dly, *Replevin* is a Diſſeiſin of a *Rent Service* or *Rent Charge*: for if the Rent be in Arrear, and the Diſtreſs be lawfully taken, the *Replevin*, which obliges the Return of the Diſtreſs or Pledges, tho' under the Colour of a legal Proceſs, is equally injurious to the Perſon diſtraining, as an open Reſcue: And he may have a Return of the Beaſts or Pledges, as well upon a Writ of *Reſcue*, as upon his *Avowry*, but both equally diſturb him of the Means whereby he is to come at his Rent.

4thly,

4thly, *Counterpleading* of the Plaintiff's Title, or *vouching a Record*, and failing thereof, are Diſſeiſins of a *Rent Service* or *Rent Charge*: for when the Tenant fails in theſe Defences, they can in Truth be looked upon no otherwiſe than as affected Delays, made uſe of in a colourable Way to avoid the Payment of Rent.

Counterpleading the Title of the Plaintiff a Diſſeiſin. Co. Lit. 160. b. 161. b.

5thly, *Denial* is a Diſſeiſin of a *Rent Charge* and *Rent Seck*, but not of a *Rent Service*; and the Reaſon of the Difference is this: becauſe in the Caſe of a *Rent Service* there is *Homage*, or at leaſt *Fealty* attending of it, which the Tenant hath ſworn, and the Lord hath accepted of his Tenant; and therefore the mere Act of *Denial* of the Tenant, only amounts to a Denial to hold upon ſuch Terms, but does not totally deny to hold of him: wherefore the Lord is not put out of Poſſeſſion of the Tenure, and by Conſequence, there is no Diſſeiſin. But in the Caſe of a *Rent Charge*, or *Rent Seck*, there is no other Obligation between the Grantor and Grantee, but merely to Payment;

A *Denial* either of *Rent Charge* or *Seck* a Diſſeiſin: ſecus of *Rent Service*.

ment; therefore, the *Denial* of such Payment is disseising him of the whole: and though the Grantee may have Access to the Land for a Distress, notwithstanding the Denial; yet such Distress is only taking of Pledges, which are subject to a Replevin; and such *Denial* shews an original Intention to controvert the Being of the Rent, and therefore is a Disseisin of the Grantee.

What an Assize is.

This Writ of *ASSIZE restores the Party to the actual Seisin of the Freehold*; for so are the Words of the Writ, "*Facias* "*Tenementum illud Resesiri &c.*:" and consequently, the Party that brings this Writ must found it upon an *actual Seisin* of which he has been *divested*; for otherwise this Remedy is not commensurate to his Case: and therefore, here it is farther necessary to inquire, *what shall be a sufficient* Seisin *to ground an Assize upon.*

What a sufficient Seisin to found a *Distress* or an *Assize.*

And in the first Place it is observable, that there is a Difference between the *Seisin* required to intitle the Party to his *Distress* and *Avowry*, and the *Seisin* to ground the *Assize* upon.

For

For Inſtance, if there be Lord and Tenant, by Homage, Fealty, and Suit of Court, and the Tenant does Fealty to his Lord, this is a ſufficient Seiſin to enable him to diſtrain for the other Services: becauſe the Tenant, by his Oath of Fealty, having engaged himſelf to the Performance of the Services, if he omits to do them, contrary to his ſolemn Oath, it is but reaſonable that he ſhould be ſubject to ſome Penalty, for ſuch wilful Omiſſion: wherefore the Law has allowed the Lord in ſuch Caſes to take Pledges of the Tenant for the Performance of the Services, which he hath undertaken by his Oath to do; and theſe Pledges or Diſtreſs, being a *Pain* upon the Tenant, to oblige him to an actual Return or Payment of the Services, it would be abſurd to ſay, that the Lord ſhould not have this Remedy by Diſtreſs, till he had been once actually ſeiſed of them: for that would be to put it in the Power of the Tenant, whether ever he would pay them or not; ſince he could not be compelled to it, unleſs he once willingly gave the Lord Seiſin of them.

What a ſufficient Seiſin to found a *Diſtreſs*.

4 Co. 8. Bevil's Caſe.
1 And. 57, 58.
Co. Lit. 68. a.
Bro. Avow. 24, 32.

But

There must be an actual Seisin.

But there must be an *actual Seisin of the Rent* in the Case of *Rent Services*, to ground an *Assize*; because this is a Remedy for the *Restitution of the Freehold* of which the Party was once in Seisin or Possession: But the Fealty in the former Case can be no actual Seisin of the other Services; because, tho' the Tenant, by his Oath of Fealty, has solemnly undertaken for the faithful Performance of them, yet such Undertaking is not an actual Performance; and consequently the Lord is not thereby seised of his Services: But such Oath gives him a Right to them, and the Law has given a correspondent Remedy to that Right, which is by Pledges or Distress.

Lord and Tenant by Rent Service, the Lord grants the Services to *B.* the Tenant *attorns* by a *Penny*, the Grantee distrains for the Arrears, and the Tenant rescues, the

Therefore, if there be Lord and Tenant by Rent Service, and the Lord grants the Services to another, and the Tenant *attorns* by a *Penny*; and the Grantee afterwards distrains for the Rent in Arrear, and the Tenant rescues the Distress; yet the Grantee shall have *no Assize* for the Rent, but a Writ of *Rescue:* because the Penny was given in the Name of *Attornment*, which only shews the Tenant's Concurrence

to

to the Grant, and that he is willing to pay the Rent when it becomes due to the Grantee, as he formerly did to his firſt Lord. But ſuch Concurrence or Approbation of the Tenant only obliges him to pay the Rent when it becomes due, but does not give the Grantee an actual Seiſin before it is paid him; and conſequently there can be no Diſſeiſin of a Thing of which a Man was never in Poſſeſſion.

Grantee cannot bring his Aſſize. Lit. Sect. 565.

But if the *Penny* had been given by Way of *Seiſin* of the *Rent*, that had been ſufficient to ground an Aſſize: becauſe here the Grantee is put into Poſſeſſion of the Rent by the Tenant himſelf; and therefore, if the Poſſeſſion be violated, the Grantee may have his *Aſſize*, which is the proper Method or Remedy to reſtore that Poſſeſſion.

Secus if the Penny was given by Way of *Seiſin of Rent*. Co. Lit. 315. a. Lit. Sect. 565. 4 Co. 9. b. 10 Co. 127.

If a Leaſe be made for Life, or a Gift in Tail, reſerving the firſt Year a *Buſhel of Wheat*, and afterwards the *annual Rent* of 5 *s.*; if the Leſſee pays the Buſhel of Wheat to the Leſſor, that is a *ſufficient Seiſin* of the annual Rent to ground an *Aſſize:* becauſe the Wheat and Rent, tho' they be Things of a different

A Seiſin of Part ſufficient to bring an Aſſize for the whole. 4 Co. 9. a. Co. Lit. 153. a. 5 E. 4. 2. 2 Rol. Ab. 463.

different Nature, are but one intire Reſervation; and the Seiſin of *Parcel* is ſufficient to have an *Aſſize* of the *whole Service.*

So of a Rent Seck. Lit. Sect. 233.

So it is in the Caſe of a Rent Seck; if the Tenant pays any *Parcel* of the Rent to the Grantee, and afterwards refuſes to pay the Remainder of the Rent that is due, if the Grantee himſelf, or any Perſon impowered by him, demands the Rent upon the Land, and the Tenant does not pay it, the Grantee may have his Aſſize.

4 Co. 9. Co. Lit. 152, 153. a. Kelw. 104. a.

If there be Lord, Meſne and Tenant, and the Meſnalty becomes Seck *by Surpluſage*, yet the ancient Seiſin of Meſnalty, tho' the Nature of it be changed, is ſufficient to maintain an Aſſize. But to explain this by an Inſtance; if there be Lord and Tenant by 6 *d.* Rent, and the Tenant makes a Feoffment in Fee, reſerving Rent 12 *d.*; the Rent of 12 *d.* was before the Statute of *Quia Emptores &c.* a Rent Service in the Meſne, for which he might have diſtrained: if then the Lord had purchaſed the Tenancy, the Seigniory of 6 *d.* which the Meſne paid the Lord had been extinct;

becauſe the Lord could not have both the Land and his Seignory iſſuing out of it: and tho' the Lord purchaſed from the Tenant, yet he could not hold from the Meſne as the Tenant did; becauſe he muſt hold of his old ſuperior Lord: in this Caſe however, the Rent of Sixpence, which the Meſne reſerved to himſelf, over and above the Seignory of 6 *d.* which he paid to the Lord, ſhall not be loſt, but the Meſne ſhall have ſo much iſſuing out of the Land, though not as a Rent Service; becauſe the Lord, who purchaſed the Tenancy, is not in his Homage, the Tenure being of the ſuperior Lord of the Fee: yet 6 *d.* Surpluſage, is ſuch a Rent as the Meſne may diſtrain for, and have his Aſſize; becauſe, being once in Seiſin of it as a Rent Service, the Act of the Lord and Tenant, which extinguiſhes the Meſnalty, and changes the Nature of the Rent, ſhall not deprive the Meſne of his Remedy, which he might have had for the Recovery of ſuch Rent before the Purchaſe; becauſe the Meſne ought not to receive any Prejudice from the Acts of another to which he was a Stranger, and never gave his Concurrence:

rence: and therefore the Seiſin of his Meſnalty, before the Purchaſe, is ſufficient to maintain an Aſſize for the 6 *d.* Surpluſage, when the Meſnalty is extinct from the Purchaſe.

4 Co. 9 b. But if there be Lord and Tenant by Fealty and Rent, and the Lord grants over the Fealty, the Rent is now become Seck; becauſe, by the Grant of the Fealty, the Tenure is no longer of the Lord, but of the Grantee: for the Tenure cannot be of the Lord, when he by his own Act has permitted the Tenant to do Fealty to the Grantee; which is a full Acknowledgment that the Land is held of the Grantee: and the Rent that remains in the Lord's Hands is become Seck, becauſe the Tenure and Fealty, which made it a Rent Service, are diſunited from it, by the Act of the Lord himſelf; and conſequently as a Rent Seck, there muſt be a Seiſin of it before it can be recovered in an Aſſize.

Ibid. So it is, if there be a Gift in Tail, or a Leaſe for Life, reſerving Rent, and the Donor or Leſſor grants the Reverſion,

verſion, ſaving the Rent, this Rent is become Seck, and the Donor or Leſſor muſt have Seiſin of it after the Grant, to maintain an Aſſize. And the Reaſon is this; becauſe the Rent, by the Reſervation upon the Leaſe or Gift, was in Nature of a Retribution for the Land, which the Law obliges the Tenant, under the Engagement of the Oath of Fealty, to make; but this Oath of Fealty can be obligatory only while the Tenure between the Leſſor and Leſſee continues, the Words of the Oath being, "*That the Tenant ſhall bear* "*Faith for the Lands which he holds;*" whereupon, when the Leſſor grants the Reverſion, the Tenure is of the Grantee, and the Fealty as an Incident to it follows the Reverſion; becauſe the Deſign of the Oath is to oblige the Tenant to bear Faith for the Lands that he holds, and conſequently that Faith muſt be born to him of whom the Lands are holden; and therefore the Donor or Leſſor, having by his own Act diſpenſed with the Obligation the Tenant was under to pay him, has no Remedy to oblige him to pay, and conſequently cannot maintain an Aſſize for

the Rent upon the old Seiſin before the Reverſion was granted.

4 Co. 9 b. 2 Rol. Ab. 465. Co. Lit. 202. b. al con'.

But if the Lord grants his Seigniory upon Condition, and the Tenant pay his Rent to the Grantee, and the Condition is afterwards broken, if then the Lord diſtrain for his Services, and the Tenant reſcue the Diſtreſs, the Lord ſhall have his Aſſize; becauſe by a Breach of the Condition, the Lord is replaced in his ancient Eſtate, and as if the Grant had never been made. — *Quære tamen*, whether an ancient Seiſin be ſufficient.

If a Return irrepleviſable be awarded it is a good Seiſin of Rent. 4 Co. 9 b. 2 Rol. Ab. 464.

If a Return *irrepleviſable* be awarded, that is a good Seiſin of the Rent, for which the Diſtreſs was taken: becauſe ſuch Return is an abſolute Condemnation of the Pledges, and being given as an Equivalent for the Rent, they ſhall be looked upon as the Rent itſelf, ſince they are a full Satisfaction for it; and if they were otherwiſe, that Obſtinacy of the Tenant's might defeat the Lord of his proper Remedies.

So

So if the Tenant refuſes to do *Suit of Court*, and the Lord recover Damages againſt him; this is a ſufficient Seiſin of the Suit: becauſe the Damages are given againſt him as an Equivalent, and in Satisfaction of the Suit. 4 Co. 9. b.

Who may give *Seiſin* of a Rent to ground an Aſſize.

And here it has been reſolved, that Tenant for *Years* of Land out of which a Rent Seck iſſues cannot, by Payment of the Rent, give the Grantee Seiſin; becauſe the Termor for Years having no Intereſt in the Freehold out of which the Rent proceeds, he cannot, by any Act of his, bind another's Intereſt. Therefore, if a Man deviſes a Rent of 10*l.* out of his Lands to *A.* for his Life, and deviſes the Lands chargeable with the Rent to *B.* for Years, and dies; tho' *B.* pays the Rent to *A.* during the Term, yet this is not a ſufficient Seiſin for *A.* to bring an Aſſize againſt him that has the Freehold of the Land after the Term expired: for the Termor is a perfect Stranger to the 6 Co. 56, 57. Bodman's Caſe. Cro. Ja. 142 and 185. 2 Rol. Rep. 181. 2 Rol. Ab. 485.

Freehold, and conſequently cannot affect it, or the Proprietor of it, by any Act of his. And ſince an Aſſize for ſuch Rent muſt be brought againſt the Tenants who have the Freehold, it is but reaſonable, that they only, who are to anſwer in the Aſſize, ſhould make themſelves liable to the Remedy.

2 Rol. Ab. 464. 6 Co. 57. b. But Seiſin of a Rent Seck by the Hands of a Diſſeiſor is ſufficient to ground an Aſſize; becauſe, though his Title be defeaſable, yet, until it be defeated, he is in Seiſin both of the Freehold and Inheritance; and therefore all lawful Acts done by him, without Fraud or Covin, ſhall bind the Diſſeiſee.

Co. Lit. 269. a. 2 Rol. Ab. 464. So if there be Tenant in Tail of Land, and he makes a Feoffment in Fee, if the Diſcontinuee pays the Rent, this is a ſufficient Seiſin to ground an Aſſize upon; becauſe any lawful Acts done by the Tenant of the Freehold, tho' by a defeaſable Title, are obligatory; or elſe in many Inſtances ſuch Diſſeiſins would be extremely prejudicial to Strangers.

But though, by the Policy of the Feudal Law, there was no Remedy for the Recovery of a Rent Seck, without the Grantee had an actual Seiſin of it; becauſe ſuch Grants, as it is ſaid, were ſo far from contributing to the public Safety, as Feudal Donations, that they really weakened it; and therefore were ſaid to be *againſt common Right*: yet as thoſe Tenures declined, and were at length aboliſhed, the Chancery interpoſed to mitigate the Rigour of the Feudal Law; and it has been therefore ruled in Equity, that where an Annuity was deviſed by Will to *A.* and the Land, ſubject to the Annuity, to *B.* that *B.* ſhould give Seiſin of the Rent Seck to *A.*; that he might have a Remedy for the Recovery of it at Law: for certainly the Intention of ſuch Gift is, that the Deviſee ſhould receive ſome Benefit from it; and therefore it is but reaſonable, that a Court of Equity ſhould give Relief.

1 Chan. Caſ. 79, 147. Moor pl. 859. Webb v. Webb, Lutwich 1092, 146. 4 Leon. 184.

A Bill was brought for 3 *l.* for a Rent of 5 *s.* Arrear for 12 Years; The Equity of the Bill being, that the Deeds by which

A Bill brought for 3 *l.* for a Rent of 5 *s.* in Arrear for 12 Years, and

decreed, the Title Deeds being loſt, and therefore no Remedy at Law.
1 Chan. Caſ. 120. Collet v. Jacques.

which the Rent was created were loſt, and conſequently the Rent, *at Law:* The Court, upon the Plaintiff's proving the conſtant Payment till the laſt 12 Years, decreed the Defendant to pay the Arrears, and growing Rent: for ſince, by the Payment, it was evident the Plaintiff has a Right to the Rent; and that he could not, without his Deeds, make a Title at Law; therefore the Court decreed the Defendant to pay the Rent; and ſo ſubjected his Perſon, which poſſibly might not have been liable by the Deeds that created the Rent.

The Writ of Annuity the 4th Remedy at Law for Recovery of Rent.
Lit. Sect. 219. F. N. B. 152. a.
6 Co. 58. b.

Another Remedy which the Law has provided for the Recovery of Rents, is *the Writ of Annuity.* As if a Man grants by his Deed, an annual Rent to *A.* in Fee, for Life, or for Years, and the Rent is behind; the Grantee may bring his Writ of *Annuity* againſt the Grantor, and thereby charge his *Perſon:* and this Remedy is founded upon the Words of the *Contract*, which, being preſumed to be grounded on a valuable Conſideration, is always taken moſt ſtrongly againſt the Grantor. And therefore where a Man grants an annual

Rent, the *Perſon* granting is as well liable to the Charge as the *Land*; becauſe the Perſon of the Grantor ought to be liable to the Payment of what he himſelf hath given. And hence it follows;

Firſt, That no Writ of Annuity lies for a Rent Service; becauſe the Rent Service, being ſomething reſerved by the Leſſor by Way of Retribution for the Lands demiſed, proceeds not from the Grant of the Leſſee, the Reſervation being the Act of the Leſſor; and conſequently the Perſon of the Leſſee ought not to be liable to the Diſcharge of a Thing he never granted: For the Leſſee is only paſſive, and takes the Land upon ſuch Terms of the Leſſor as he is willing to part with it; and, by ſuch Acceptance of the Land, agrees to the Reſervation of the Rent;—And hence it follows, that, ſince the Statute of *Quia Emptores &c.*, if a Man makes a Feoffment in Fee, reſerving Rent, no Writ of Annuity lies for it: for, ſince the Statute, this can be no Rent Service, becauſe the Tenure is not of the Feoffor, but of the ſuperior Lord; and

2 Rol. Ab. 226.
1 H. 4. 4.
No Writ of Annuity for a Rent Service.

conſequently the Feoffee is not under the Engagement of the Oath of Fealty to the Performance of it: and, ſince the Rent ariſes from the Words of the Feoffor, the *Perſon* of the Feoffee is not liable to the Payment of a Rent, which he never granted; and therefore is not chargeable with it: yet by the Acceptance of the Feoffment, he takes the Land ſubject to the Charges, which the Feoffor has laid upon it; and ſuch Acceptance, admitting the Charge, amounts to a *Grant* in Law to ground an Avowry upon; but the Feoffor cannot avow for it as a *Service* ſince the Statute.

A Feoffment in Fee reſerving Rent, amounts to a Grant at Law to ground an Avowry on.

Secondly, it follows; That if a Man deviſes a Rent out of his Land, and dies, no Writ of Annuity lies for ſuch Rent: becauſe the Deviſe cannot take Effect till after the Death of the Deviſor, and then it is impoſſible to charge the Perſon.

Annuity lies not for a Rent deviſed. 6 Co. 58. b.

But no Writ of Annuity lies for Rent granted for *Equality* of *Partition*, or in Lieu of *Dower*: for tho' theſe be given by the Perſon, yet being given in

It lies not for a Rent granted for Equality of Partition, or in Lieu of Dower. Pop. 87.

in Satisfaction of a *real Eſtate*, they retain the Nature of the Things for which they were given; and therefore not recoverable in a perſonal Action. Co. Lit. 144, 5. 2 Rol. Ab. 223.

If a Man grants a Rent out of his Land, and by a *Proviſo* in the Deed of Defeazance it be provided, that the Grant, nor any thing therein contained, ſhall be conſtrued to extend to charge his *Perſon* by Writ of Annuity; in this Caſe, the Perſon of the Grantor is not chargeable: becauſe the Charge upon the Perſon, ariſing only from the Manner of conſtruing Grants, which, from the Conſideration given, ought to be extended as far as the Words will bear againſt the Grantor; there can be no Room for ſuch Conſtruction, when, by the expreſs Words of the Grant, the Perſon of the Grantor is not to be charged: for no Implication ſhall be admitted to overthrow an expreſs Clauſe in the Deed.—But if, in this Caſe, the Proviſo had been, that the Grant, nor any thing therein contained, ſhall charge the *Land*, that Proviſo had been void; becauſe no ſubſequent Clauſe ſhall be allowed to defeat the former Part of the Deed:

A Rent granted with a Proviſo in the Deed, that nothing ſhall extend to touch the *Perſon* of the Grantor, the Grantor's *Perſon* cannot be charged. Lit Sect. 220. Pop. 87. 6 Co. 87 b.

Secus if the Proviſo had made the *Land* not chargeable. Co. Lit. 146, a. Pop. 87.

Deed: and therefore, when by the firſt Part of the Deed the Land is expreſly charged with the Rent, the Proviſo to exonerate it is inconſiſtent, and therefore void.

So if a Rent Charge is granted out of the Manor of *D.* in which the Grantor has no Intereſt, proviſo, that the Grantor's Perſon ſhall not be charged; this void. Co. Lit. 146. a. 61, 41. b. 7 Co. 38. b.

So it is if a Man grants a Rent Charge out of the Manor of *D.*, in which the Grantor has *no Intereſt*, with a Proviſo, that the Grant ſhall not charge his Perſon; this Proviſo is void: becauſe the Grantor, having nothing in the Manor of *D.*, could not by any Act of his charge it; and conſequently, the Grantee having no Remedy for his Annuity, but againſt the Perſon of the Grantor, the *Proviſo* to exempt his Perſon is void; as rendering the whole Grant ineffectual. And if in this Caſe the Grantor had been ſeiſed of the Manor, and had granted a Rent Charge out of it for the Life of the Grantee, with a Proviſo, that the Grant ſhould not charge his Perſon, the *Grantee himſelf* could have no Remedy but by *Diſtreſs*; becauſe that Remedy being open to him, the Proviſo is good to *exonerate* the Perſon: yet, upon the Death of the Grantee, the *Executors* may have an Action

Action of Debt againſt the Grantor for the Arrears; becauſe the Executors have no other Remedy for the Recovery of them, for they cannot diſtrain after the Grant is determined: and therefore the Proviſo to exempt the Perſon of the Grantee is void againſt the *Executors*, as rendering the Grant uſeleſs and ineffectual.

So a Rent Seck granted out of Lands, Proviſo, that the Perſon of the Grantor ſhall not be charged, void. 6 Co. 58.

And hence it is; that if a *Rent Seck* be granted out of Lands with a Proviſo, that the Perſon of the Grantor ſhall not be charged, that this Proviſo is void: becauſe the Grantee not having a Diſtreſs given by the Deed for the Recovery of the Rent, would be without any Manner of Remedy, if the Proviſo took Place: but in this Caſe, if the Grantor had given a Penny, or any other Thing, in the Nature of Seiſin of the Rent, the Proviſo to exonerate the Perſon had been good; becauſe then, the Grantee, having been once in Seiſin of the Rent, ſhall be reſtored to it by Writ of Aſſize, if the Grantor diſſeiſes him by non-payment; and conſequently, by ſuch Exemption of the Perſon, the Grant is not rendered ineffectual.

But a Penny given in the Name of Seiſin of the Rent, would diſcharge his Perſon.

If

Lit. Sect. 221. Co. Lit. 146. b.

If a Man by his Deed grants; that if *A.* be not yearly paid the Sum of 10 *s.* that then he may diſtrain for it in his Manor of *D.*: this is a good Rent Charge out of the Manor; but no Writ of Annuity lies for it, becauſe there is no Grant of the Rent made by the Grantor; yet, becauſe he hath given the Grantee a Power to diſtrain, if ſuch a yearly Sum be not paid him, the Manor is thereby charged with the Diſtreſs, and conſequently with the Rent for which the Diſtreſs is given.

Co. Lit. 147. b. *A.* and *B.* grant a Rent Charge with Proviſo, that the Grantee ſhall not charge the Perſon of *A.*; this good, but the Grantee may have a Writ of Annuity againſt *B.*

If *A.* and *B.* Joint-tenants grant a Rent Charge out of their Land, with a Proviſo, that the Grantee ſhall not charge the Perſon of *A.*: this diſcharges the Perſon of *A.*, but leaves *B.* liable to the Writ of Annuity.

Wherefore, ſince there are two Remedies for the Recovery of a Rent Charge and Rent Seck; either by *Writ of Annuity*, or *Diſtreſs* on the Lands in Caſe of a *Rent Charge*; or by *Aſſize* in Caſe of a *Rent Seck* after Seiſin:—It is next to be conſidered what is moſt adviſeable

viſeable to purſue;—and 2dly, what Acts of the Grantee ſhall determine his Election.—Now to ſhew the Difference between the Remedy by *Writ of Annuity* againſt the Perſon of the Grantor, and the other Remedies by *Diſtreſs* or *Aſſize*; we ſhall conſider the following Caſe in both Lights, either as Annuity, or a Rent Charge.

1ſt. In what Caſes Diſtreſs, or the Writ of Aſſize, and in what Caſes the Writ of Annuity are the more eligible Remedy.

If *A.* grants a Rent Charge to *B.* *and his Heirs*; if the Rent be behind, not only the *Grantee*, but his *Heirs in infinitum*, may diſtrain for it.—And ſo in Caſe of a *Diſſeiſin*, they may for ever purſue their *Aſſize*, and *Writs of Diſſeiſin*: becauſe, while they demand it as a Charge affecting the Land, it muſt have a Continuance, under that Determination, while there are any Heirs or Repreſentatives of the Grantee in being; and the Remedy being commenſurate to the Right, muſt be equal in its Duration with the Right.—But if in

1 Rol. Ab. 226. Pop. 87. Hob. 58. Dy. 344. b. Co. Lit. 144. b.

In what Caſes Diſtreſs, or the Writ of Aſſize, are the better Remedy.

in this Caſe the Rent be in *Arrear*, and the Grantee brings a *Writ of Annuity*, in order to charge the Perſon of the Grantor; it is no longer to be conſidered as a Rent iſſuing out of the *Land*: becauſe the *Writ of Annuity* has turned the Charge intirely upon the *Perſon* of the Grantor; and, under that Determination, it muſt determine with the Life of the Grantor; becauſe his Heir is not chargeable: and therefore the Writ of Annuity is far from being an adequate Remedy, becauſe it turns the Rent Charge in Fee, into an Annuity for Life. And the Reaſon why the *Heir* is not chargeable in this Caſe, as the *Executor* is in Caſe of a *Bond* entered into by the Teſtator without being named, is this; by the Common Law, only the Goods and Chattels of the Debtor, and the annual Profits of the Land as they aroſe, and *not the Land* itſelf were liable to Execution for Debt or Damages; becauſe it was only a *Chattel* that was lent, and therefore only the *Chattels* of the Debtor were liable: and theſe, being the Security the Creditor depended upon, were liable in the Hands of the Repreſentative

or

or Executor, as well as in the Hands of the Debtor himſelf.—And hence it was, that the Executor was bound to anſwer the Debt of the Teſtator, ſo far as he had Chattels or Aſſets, tho' he was not named in the Contract.—But the Lands were not liable to Execution; becauſe they were preſerved from the perſonal Contracts and Engagements of the Tenant, that he might be the better able to anſwer the Feudal Duties to the Lord, which were the Life and Support of the Government: And therefore, the Land, not being originally liable to the Demands in the Hands of the Grantor, muſt be much leſs liable in the Hands of the Heir, who was not comprehended in the Contract or Grant: But if *A.* had granted, *for him and his Heirs*, to *B. and his Heirs*, ſuch a Rent Charge out of his Land; in this Caſe, the Heirs, being comprehended in the Contract, are bound to make good the Grant, ſo far as they have Aſſets by Deſcent: for the Grantee of the Rent had the Land originally in View for his Security; and by the Grant itſelf having it in his Power to diſtrain the Land for the Rent, it was equal to the Heir, whether

whether the Land was to anſwer the Rent by Diſtreſs, or by Execution upon a Judgment in a Writ of Annuity.

Pop. 87. Co. Lit. 19 a. 7 Co. 61.

Again, if a Rent Charge be granted in Tail, the Grantee cannot alien it whilſt it continues a Rent; becauſe, as ſuch, it may be intailed within the Statute *de Donis*: but if the Grantee brings his Writ of Annuity, it is no longer within the Statute; becauſe then it is become a Charge merely *perſonal*, without any Relation to the Land out of which it was firſt granted; and therefore is become a Fee-ſimple conditional, as ſuch a Gift of Land would have been before the Statute; and therefore the Annuity, not being before the Statute, may be aliened.

Pop. 87. In what Caſes the Writ of Annuity is the better Remedy.

But in ſome Reſpects the *Writ of Annuity* is the better Remedy: — As if a Termor for Years grants, for him and his Heirs, a Rent Charge out of his Lands, to another and his Heirs: in this Caſe, if the Grantee *diſtrains*, and thereby has thrown the Charge off the Perſon intirely upon the Land; upon the Expiration of the Term, the Rent is gone:

gone: becauſe the Grantor could not charge the Land longer than his own Intereſt in it continued. — But if the Grantee had brought his *Writ of Annuity*, the Charge upon the Perſon had been perpetual, ſo long as the Heirs of the Grantor had any Aſſets: becauſe the Grant was for *him and his Heirs*; and therefore the *Heirs*, being comprehended in the Grant, ſhall be bound by it, while they have any Aſſets from the firſt Grantor.

2dly, What Acts of the Grantee are ſufficient to determine his *Choice*.

What Acts of the Grantee ſhall determine his Choice. Lit. Sect. 219. 1 Rol. Ab. 228. Co. Lit. 145.

And this Determination muſt be *by ſome ſolemn Act in a Court of Record*: that it may appear to be the *Act* of the Grantee himſelf, and not of a Stranger, without his Permiſſion or Authority. And therefore, if the Grantee diſtrains for the Rent, that is no *Determination* of his *Election*:—So in the Caſe of an *Aſſize*, or Writ of Annuity, the *ſuing them forth* is no Determination; becauſe theſe may be done by a Stranger, without the Grantee's Knowledge or Conſent: or rather, becauſe the Deſign of

the Law being to help Men to the Recovery of their Rights in the moſt beneficial and beſt Method; the Grantee ſhall not be foreclоſed, of either of his Remedies, by any raſh unadviſed Act of his. But if the Grantee *counts* in the Aſſize, or Writ of Annuity; or *avows* the Taking of the Diſtreſs; the *Count*, and the *Avowry*, is a repeated Determination, or plain Confirmation of his firſt *Choice* and Election; and this, being entered upon Record, is taken to be the deliberate Act of his Mind: and therefore he ſhall not be allowed to recede from what he has done in ſo ſolemn a Manner.

A Count in Aſſize, or Avowry of the Diſtreſs, is a Determination of the Grantee's Choice.

Dy. 344 b. Hob. 58.

But if a Man grants a Rent Charge in Fee, without ſaying, *for him and his Heirs*, and the Grantor dies, and the Grantee brings a Writ of *Annuity* againſt the Heir; tho' he *counts* thereon, and proceeds to *Judgment*, yet that does not foreclоſe him of his Diſtreſs on the Land, out of which the Rent iſſues: becauſe, by the Death of the Grantor, the Grant, *as an Annuity*, was determined; and conſequently, the Grantee had no Election, having but one Remedy for Recovery

Recovery of it, which was *by Diſtreſs*; which in this Caſe ſtill remained, becauſe the Grantee loſt his Election by the *Act of God*, for which no Man ought to ſuffer.

So it is if Tenant *pur auter vie* grants a Rent Charge for 10 Years, and the *Ceſtui que vie* dies: in this Caſe, the Charge is determined as a Rent; becauſe the Eſtate for Life out of which it iſſues is ended: but the Grantor is ſtill liable to a Writ of Annuity; becauſe the Grantee had not, by any *Act of his own*, determined his *Choice*; and therefore, the Election being taken away by the *Act of God*, and not by any *Act of his own*, he may purſue the other Remedy by Writ of Annuity.

Pop. 86, 87. Fulwood v. Ward. Co. Lit. 148. Moor 301. 2 Co. 36.

But if the Grantee of a Rent Charge, before he has made his Election, purchaſes Part of the Land; in this Caſe he is without any Remedy, either againſt the *Land*, or the *Perſon* of the Grantor: the *Land* is not liable becauſe the Rent is *extinct* by the Purchaſe, for Reaſons which ſhall be hereafter given, it being in its original Creation a Rent

If a Grantee purchaſes Part of the Land, the Rent is extinguiſhed. Co. Lit. 148.

Charge: And tho' the Law gives a double Remedy for the Recovery of it, yet when the Grantee has, *by his own Act*, diſcharged the Land, and *extinguiſhed* the Rent, he can have no Remedy for the Thing which he had *wilfully* deſtroyed; and therefore he can have no Writ of Annuity againſt the *Perſon*.

Of the *Remedies* for Recovery of Rents by the *Proviſion of the Parties*.

The Remedies for the Recovery of Rent provided by the Parties.

The Remedies for the Recovery of Rent which ariſe from the *Proviſion and Appointment of the Party*, are either by *Diſtreſs*; or by a Power of *Re-entry* into the Lands, out of which the Rent iſſues, and to hold it till the Grantee be ſatisfied by the Perception of the Profits. The *Diſtreſs* is neceſſary to be provided by the Deed, *only* in Caſe of a *Rent Charge*. For the mere *Grant* of a Rent out of Lands, does not ſubject the Land itſelf to a Diſtreſs; as the *Reſervation* of a Rent Service upon a *Gift* or *Leaſe* makes the Land, in Return for which the Services are given, liable to

Remedy by Diſtreſs, if provided by the Deed.

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a Diſtreſs for the Payment and Diſcharge of it: Becauſe in the *Rent Charge* there is nothing, in the Nature of the Grant itſelf, to found ſuch a Remedy upon; nor is the Tenant of the Land *in that Caſe*, under an Engagement of the Oath of Fealty to pay it, as he is in the Caſe of a *Rent Service*, becauſe there is no *Feudal Tenure* between the Grantor and the Grantee; and conſequently, not that mutual Engagement which ariſes between Lord and Tenant, by a *Feudal Donation* or *Gift*. And hence it is, that theſe Grants are ſaid in the Law Books, to be *againſt common Right*; that is, they were againſt the Policy of the *Feudal Structure*: becauſe ſuch Grants create no Dependency of the Grantee on the Grantor; nor was he obliged to attend the Grantor in the Wars, or venture his Life for the Public on Account thereof, as the Perſon that took under any *Feudal Donation* was obliged to do: but on the contrary, the Tenant, that granted ſuch a Rent out of his Land, was thereby leſs able to perform the Feudal Duties; and therefore it was, that the Law provided no Remedy, but

Why a Rent Charge ſaid to be againſt common Right. V. poſt'.

left the Party to provide one for his own Security.

A. ſeiſed in Fee, and poſſeſſed of a Leaſe for Years, grants a Rent Charge for Life out of both, with a Clauſe of Diſtreſs in both, the Rent iſſues only out of the Inheritance, but the Grantee may diſtrain both.
7 Co. 23, 24. Butt's Caſe.
Co. Lit. 147. b.
Cro. Ja. 390.
Rol. Rep. 330.
Cro. Eliz. 622.

If a Man ſeiſed *in Fee* of Lands, and poſſeſſed of other Lands *for Years*, grants a Rent Charge for Life out of *both*, with a Power to diſtrain in *both*; if the Rent be in Arrear, the *Leaſehold* as well as the Eſtate of *Inheritance* are ſubject to the Diſtreſs; becauſe a Man may oblige his Chattels to the Diſcharge of the Rent: but that Rent, being a Freehold, ſhall only iſſue out of the Eſtate of Inheritance; becauſe the Leaſehold, being only a temporary and periſhable Intereſt, is not a Fund ſufficient to the Charge: and therefore the Rent ſhall iſſue out of the Inheritance, which for its Duration is a more competent Eſtate to ſupport the Charge, and render the Grant effectual. And hence it was adjudged in *Butt*'s Caſe, that tho' the Grantee might *diſtrain* the *Leaſehold* Lands, he may *avow* for a Rent iſſuing only out of the *Inheritance*.

A Rent granted for Life out of a Term for Years, good during the Term and Life.
7 Co. 25. a.
Cro. Eliz. 183.

But if a Man poſſeſſed of *a Term for Years*, grants a Rent Charge out of it to another *for Life*: tho' here the Eſtate be of ſhorter Duration than the Charge,

Charge, yet, becauſe it is the only Fund provided by the Grant for the Payment of the Rent, it ſhall anſwer the Grantee ſo long as it has Continuance, if the Life, for which the Rent was granted, laſts ſo long as the Term: for the Grant ſhall be taken moſt ſtrongly againſt the Grantor that made it; and therefore ſhall not be conſtrued to be void *ab Initio*, when it may poſſibly take Effect according to the Intention of the Parties.

Remedy by Proviſion of the Parties for the Recovery of Rent by Re-entry.

The Condition of *Re-entry* for Non-payment, was the Remedy given by the old Feudal Law, which was afterwards changed into a Diſtreſs; but is yet a Remedy allowable by Law, where the Parties provide it by the Deed. As if a Man makes a Feoffment, Gift, or Leaſe, reſerving Rent, with a Condition, that if the Rent be behind, it ſhall be lawful for the Feoffor and his Heirs to *re-enter*: in theſe Caſes, if the Rent be behind, and not paid according to the Deed; the Feoffor, or Leſſor, may enter into the Lands, and hold them in his former Eſtate, becauſe the Eſtate was *not abſolute*, but *defea-*

Lit. Sect. 325, 326. Co. Lit. 201, 202.

ſable by the non-performance of the Condition.

Lit. Sect. 327. But where a Feoffment is made of Lands, reſerving Rent, upon Condition, that if the Rent be behind, it ſhall be lawful for the Feoffor and his Heirs, to enter and hold the Land, and take the Profits, *until he be ſatisfied and paid the Rent behind*; this is not a Condition abſolutely to defeat the Eſtate: but the Feoffor, in this Caſe, upon his Entry, ſhall only hold the Land as a *Pledge*, or in Manner of a Diſtreſs, till he be paid his Rent; and the Profits ſhall not go in Diſcharge or on Account of the Rent, but ſhall be applied to his own Uſe, that by ſuch Perception, the Tenant may be obliged the ſooner to pay the Arrears of Rent.

Co. Lit. 203. But if the Condition had been, that if the Rent be behind, the Leſſor ſhould re-enter, and take the Profits, *until thereof he be ſatisfied*; there the Profits ſhall go into the Account of the Rent: and conſequently, when the Profits received are equivalent to the Arrears of Rent, the Leſſee may re-enter, and hold it

it under the former Leaſe: And though Part of the Rent be paid the Leſſor before the Re-entry, yet if the whole be not paid him, he may enter for any Part that is in Arrear; becauſe the Condition is to inforce the Payment of the whole Rent, and therefore he may take Advantage thereof for non-payment of any Part of it.

If a Man grants a Rent Charge to *A.* his Heirs and Aſſigns, and if it ſhall happen, that the Rent be behind and unpaid, that then the ſaid *A.* his Heirs and Aſſigns, ſhall re-enter into the Land, and have and enjoy the Rent thereof *until the Arrears be fully ſatisfied*; and the Grantor covenants to levy a Fine to the *Uſes* of the ſaid Deed: if, after the Fine levied, the Rent be in Arrear, the Grantee may enter into the Land, or make a Leaſe for Years, to try the Title in Ejectment: becauſe, by the Fine, there is an Eſtate veſted in the *Conuſee* to raiſe an Uſe in the Grantee of the Rent Charge, when the Rent is behind; and whenever the Rent comes in Arrear, the Poſſeſſion is executed to that Uſe; and conſequently, the Grantee

Cro. Ja. 510, 511, 512. 2 Rol. Rep. 12. Pop. 126, 149. 3 Bul. 250. 1 Sid. 262. 1 Leo. 171.

tee has a Right to take and keep that Poſſeſſion, until the Uſe for which it was executed be ſatisfied; and that was, till the Arrears of Rent be paid by the Perception of the Profits. And therefore, though the Grantee's Intereſt in the Land be uncertain, becauſe it is uncertain when the Rent will be paid out of the Profits, yet while his Intereſt remains, if his Poſſeſſion be diſturbed or diveſted, he may reſtore it by Ejectment; which is the proper Method or Remedy to recover the Poſſeſſion. And if the Grantee aſſigns over the Rent, the Aſſignee may likewiſe enter and maintain a Title in Ejectment: for the Uſe ariſes out of the Eſtate of the Conuſee, only as the Rent is in Arrear, and, till the Rent be behind and unpaid, there is nothing more than a bare Poſſibility of an Uſe, which in its Nature is not aſſignable, yet by the Conveyance of the Rent it ſhall paſs; becauſe it is nothing more than a Remedy or Security for the Rent, and therefore ſhall attend that into whoſe ſoever Hands it ſhall come.

Cro. Ja. 512. And, by the better Opinion, it ſeems, that if the Rent be in Arrear *before* the Fine levied, yet the Fine levied afterwards

wards ſhall be ſufficient to raiſe an Uſe in the Grantee to enter into the Land for the Recovery of theſe Arrears; becauſe the Fine is guided by the Deed of Grant, and both amount but to one Aſſurance: and conſequently, the Fine ſhall have Relation to the Deed which leads the Uſes of it, and make it operate.—So it is if ſuch a Rent had been granted to a Man and his Heirs, and if the Rent be behind and unpaid, then it ſhall be lawful for the Grantee and his Heirs to enter *&c.*: the Grantee, when the Rent is in Arrear, by ſuch Proviſo, may enter, and hold the Lands till he be paid the Rent by the Perception of the Profits: for tho' it was objected, that there was no Eſtate conveyed out of which an Uſe might ariſe to the Grantee upon the Non-payment of the Rent; and that this Grant could paſs no Eſtate to the Grantee as a Conveyance at common Law; becauſe the Grantee could have no Inheritance or Freehold in the Land when the Rent was in Arrear, for Want of *Livery*; nor an Eſtate for Years, for Want of a *certain Commencement and Determination:* yet it was adjudged, that by the Grant,

1 Sid. 223, 226, 344. 1 Lev. 170. 1 Keb. 784. Ray. 135, 158. 1 Sand. 112, 113.

Grant, he had an *Intereſt* veſted in him when the Rent was in Arrear; and tho' it be an *uncertain Intereſt*, which, for the Uncertainty of its Commencement and Determination might be void by the ſtrict Rules of Law, if it were granted independant on any certain Eſtate; yet it is good in this Caſe, becauſe it is created to attend a determinate Eſtate, and non-payment of the Rent fixes the *Certainty* of its *Beginning*, and the Satisfaction of the Arrears, by the Perception of the Profits, the *End* and *Determination* of ſuch Intereſt: and therefore the Grantee may reduce ſuch Intereſt, as it ariſes, into his Poſſeſſion, by Ejectment, which is the proper Method to recover the Poſſeſſion.

Of the Nomine Pœnæ.

This is a Penalty to oblige the Tenant to pay, and another Remedy by the Proviſion of the Parties.

And this is not ſo much a *Remedy* for the *Recovery* of Rent, as a *Penalty* to oblige the Tenant to a punctual Payment; and this as well of a Rent Charge, as a Rent Service: of this there are theſe three Things obſervable.

1ſt,

1ſt, In the Caſe either of a Rent *Service* or Rent *Charge*, if it be granted, that if the Rent be in Arrear, the Tenant ſhall forfeit 8 *d.* a Day as a *Nomine Pœnæ*, there muſt be an *actual Demand* of the Rent at the Day, to give a *Title* to the *Penalty*; becauſe, till an actual Demand is made, it cannot appear that there was any Default or Neglect in the Tenant: and it were unreaſonable to oblige the Tenant to pay ſuch Penalty without a wilful Default; for the Preſumption is, that he was ready to pay the Rent, to ſave the Penalty: and there is no Way to overthrow the Preſumption, but by proving an actual Demand made; and then, if ſuch actual Demand be not anſwered by Payment, it is evident, that the Tenant has wilfully neglected it, and conſequently has ſubmitted to the Penalty.

A Demand muſt be made before the Leſſor is intitled to the Pain. Hob. 82. Grantham v. Thornborough. Hob. 133.

But if the Rent be demanded at the Day, and not paid, and conſequently the Penalty forfeited: (As if a Rent be granted to *A.* for Life, and if it ſhall be in Arrear by the Space of 10 Days after the Feaſts of Payment, being lawfully

Hob. of Opinion, that the Pain muſt be demanded a Day after the Rent becomes due. Hob. 208.

fully demanded, that then the Grantor ſhould forfeit 10 *s.* by Way of *Pain*; and that then, and ſo often, it ſhall be lawful for the Grantee to diſtrain, until the Rent and Penalty be ſatisfied:) by the Opinion of *Hobart*, if the Grantee demands the Rent at the End of 10 Days, by which he becomes intitled to the Penalty, the Grantee, *on the 11th Day*, muſt *likewiſe* demand the *Penalty*, becauſe it is not due till after the 10 Days incurred; and the Grantor has the whole Day on which the Penalty becomes due to pay it. *Q.* Whether the Grantee be obliged to demand the Penalty after it becomes due by the Demand and Non-payment of the Rent.

The Leſſor may recover by Action of Debt the Rent without a Demand, tho' not the Pain; and tho' he avows for both, yet good for the Rent. Hob. 82, 133.

But if the Plaintiff brings an Action of Debt, or avows for the Rent and *Nomine Pœnæ*, without laying an actual Demand for the Rent; tho' he cannot recover the Penalty for Want of ſuch Demand, yet he ſhall by ſuch Suit have Judgment for the Rent: becauſe that is really due, and ought to be paid without any Demand.

2dly,

2dly, If the Tenant that is chargeable with the Rent aſſigns over his Intereſt in the Land, it ſeems, the Aſſignee is chargeable with the Penalty, for any Arrears incurred in his own Time; becauſe, the *Nomine Pœnæ* being intended as an Obligation on the Tenant to pay the Rent, that Obligation, from the Nature of the Contract, muſt have Continuance ſo long as the Rent is payable: and therefore, whoever takes the Land, takes it under the Charge of the Rent, and conſequently muſt be ſubject to that Penalty and Security, which was originally taken upon the Contract for the Rent.

Cro. Eliz. 333. Thinn v. Chomley. The Aſſignee chargeable with the Penalty.

3dly, If the Rent be deviſed, without mentioning the *Nomine Pœnæ*, the *Nomine Pœnæ* ſhall nevertheleſs paſs as *incident* to it; becauſe whoever has a Right to the Rent, ought to have all that Security for the Payment of it, which was taken upon the original Security and Creation of it.

Cro. Eliz. 895. Budloſs v. Phillips.

4thly, The *Nomine Pœnæ*, as incident to the Rent, ſhall deſcend to the Heir;

The Pain, as incident to the Rent, goes to the Heir. Co. Lit. 126.

Heir; becauſe, being a Penalty or Security to engage the Payment of the Rent, whoever has a Right to the Rent, ought in Reaſon to have the like to the Penalty, which is to oblige the Tenant to pay it. But the Statute of the 32 *H.* 8. giveth no Remedy for the Recovery of the *Nomine Pœnæ*, as it doth for Rents: becauſe the Grantee of a Rent Charge might have an Action of Debt for the Arrears of a *Nomine Pœnæ* at Common Law; for, being only a *Penalty*, they looked on it to be only a *Chattel*, ſince it did not grow due with every Gale of the Rent, but aroſe caſually upon the non-payment of the Rent at the Day. And for the ſame Reaſon, the Executors of the Grantee might have an Action of Debt, and conſequently there was no Neceſſity for the Statute to provide a Remedy.

Sta. of 32 H. 8. gives no Remedy for the Recovery of the Pain, but the Grantee of a Rent Charge, or his Executors, may have an Action of Debt for the Arrears of it, by Common Law.

VI. What

VI. What Acts of the Leſſor or Leſſee ſhall amount to a *Diſcharge* of the Rent: and herein is to be conſidered, the *Eviction* of the Land; the *Suſpenſion*; *Extinguiſhment*; and *Apportionment*; of the Rent.

A *Rent Service* is ſomething given by Way of *Retribution* to the Leſſor for the Land demiſed by him to the Tenant; and conſequently, the Leſſor's Title to the Rent is founded upon this; that the Land demiſed is enjoyed by the Tenant during the Term included in the Contract; for the Tenant can make no Return for a Thing he has not: if therefore, the Tenant be *deprived* of the Thing *letten*, the Obligation to pay the Rent ceaſes; becauſe ſuch Obligation had its Force only from the Conſideration, which was *the Enjoyment of the Thing demiſed.* — From hence then we may gather theſe Concluſions or Inferences. What ſhall amount to a Diſcharge of the Rent.

1ſt, That if the Lands demiſed be *evicted* from the Tenant, or *recovered* by If the Rent be evicted from the Tenant, or recovered by a Title Paramount.

2 Rol. Ab. 429. Hob. 82. Cro. Eliz. 47. Co. Lit. 201. b. 148. b.

by a Title *Paramount*, the Leſſee is diſcharged from the Payment of the Rent, from the Time of ſuch Eviction: but, notwithſtanding ſuch Recovery or Eviction, the Tenant ſhall pay the Rent that became due before the Recovery: becauſe the *Enjoyment* of the Land being the *Conſideration* for which the Tenant was obliged to pay the Rent, ſo long as the *Conſideration* continued, the Obligation muſt be in Force; there being the ſame Reaſon that the Tenant ſhould pay the Rent, for Part of the Time contracted for, as for the whole Term, if he had enjoyed the Land ſo long.

Or the Diſſeiſee ouſting the Diſſeiſor Leſſee. 2 Rol. Ab. 429. b. 2 H. 6. 20. b.

So if a Diſſeiſor makes a Leaſe for Years, rendering Rent, and afterwards the Diſſeiſee enters, and *ouſts* the Leſſee: yet the Leſſee ſhall be accountable for the Rent incurred *before* the *Ouſter*; becauſe the Leſſee cannot be taken for a Treſpaſſor, ſince he came into the Land under the Sanction of a legal Contract; tho' the Diſſeiſor, having but a defeaſable Title, could not perform the Contract; however, till it was deſtroyed, and while the Leſſee had the peaceable

Enjoy-

Enjoyment of the Land, that Obligation to pay the Rent, which was founded upon the Enjoyment, muſt continue; and conſequently, the Leſſee be obliged to pay the Rent, till the Entry of the Diſſeiſee.

For the ſame Reaſon, if *Part* only of the Land that was letten be *evicted* from the Tenant; ſuch Eviction is a Diſcharge of the Rent, in *Proportion* to the Value of the Land evicted. 10 Co. 128. a. 2 Rol. Ab. 235. Dy. 56.

If *A.* lets ſeveral Lands to *B.* and afterwards the Owner of Inheritance of the Town where Part of the Land lies, recovers a Right of Common, in which is Part of the Land demiſed; this Recovery, by the ſtrict Rules of the *Common Law*, makes no Apportionment of the Rent, becauſe the Recovery of the Common is no Eviction of the Lands, for the Soil ſtill remains in the Leſſee; and therefore there can be no Apportionment: but a *Court of Equity* conſiders, that the Leſſee ſhall have little Benefit by the Soil itſelf, while others are permitted to take the Profits in common with him; and 1 Chan. Ca. 32. 1 Rol. Ab. 934. 2 Rol. Rep. 398, 415. 2 Jones 148.

therefore, in ſuch Caſes, have apportioned the Rent; unleſs it appears, that, notwithſtanding ſuch Right of Common recovered, the Lands demiſed are well worth the Rent reſerved upon the Leaſe.

10 Co. 128. a. But theſe former Caſes are to be underſtood with this Reſtriction: that, if the Tenant be ouſted by a *Title Paramount*, before the Day appointed for the Payment of the Rent, ſuch *Eviction* diſcharges the Tenant from Payment of any Part of the Rent. For Inſtance: if *A.* Leſſee for Life, makes a Leaſe to *B.* for Years, rendering Rent payable at *Eaſter*; and *B.*, by virtue of the Leaſe, enjoys the Land for 9 Months; and then *A.* dies, by which the Intereſt of *B.* is determined; in this Caſe, *B.* ſhall pay no Rent at all: for tho' he held the Lands for 9 Months, yet his Leaſe being ended before the Expiration (for the Rent being made payable at *Eaſter* only, was payable but once in the Year,) there could be no Rent due by the Contract; for it was, in Conſideration of the Enjoyment of the Land, that the Leſſee, by the Contract, was obliged to pay the Rent at the Expiration of the Year;

Year; and when the Enjoyment is interrupted and deſtroyed, the Leſſee ſhall not be obliged to pay for what he had not: nor can there be any *Apportionment*, becauſe, by the expreſs Words of the Leaſe, it was to be paid at *Eaſter*, and not before.—From whence it is obſervable;

1ſt, That in all Leaſes, whoſe End and Determination is *uncertain*, it is moſt adviſable for the Leſſor to make the Rent payable at four *quarterly* Payments at leaſt. Vaugh. 199. Pollex. 142.

2dly, We may infer; that as the Tenant is diſcharged from the Payment of the Rent when the Land is *evicted* by a Title *Paramount*: ſo, by a Parity of Reaſon, he ſhall be diſcharged from it, when the Lord purchaſes the *Tenancy*; for in ſuch Caſe, the Lord cannot have both the Land and the Rent: nor ſhall the Tenant be under any Obligation to pay Rent, when the Land, which was the Conſideration, is reſumed by the Lord into his own Hands: and this *Reſumption* or Purchaſe of the Tenancy by the Lord, makes, what the Law Books call an *Extinguiſhment* of the Rent; that is, the Rent can never become

A Purchaſe of the Tenancy by the Lord is an Extinguiſhment of the Rent.

come due or payable by the Tenant, by Virtue of the Feudal Donation which created the Tenancy, when the Land, or Tenancy, is conveyed to the Lord, in as abſolute a Manner as he was ſeiſed of the Rent: for the Rent can never revive, when the Tenant has made an abſolute Conveyance of the Land to the Lord, in Conſideration of the Enjoyment whereof the Tenant was only obliged to the Payment of the Rent.

Bro. tit. Extinguiſhment 17.
Vaugh. 39, 109.
Pollex. 142.

3dly, If the Conveyance of the Land was not *abſolute*, but upon Condition; —or if it were only of a particular Eſtate, of ſhorter Duration than the Eſtate which the Lord had in the Rent Service;—in theſe Caſes, tho' there be an *Union* of the Tenancy and the Rent in the ſame Hand, yet becauſe that *Union* is but temporary, (for upon the Performance of the Condition, or Determination of the particular Eſtate, the Tenant is reſtored to the Enjoyment of the Land by Virtue of the old Donation; and conſequently, the Obligation to pay the Rent revives,) therefore the Rent in ſuch Caſe is only *ſuſpended*, not *extinguiſhed*.

Where a Rent ſhall be ſaid to be ſuſpended, and not extinguiſhed.

But

But in what Caſes a Rent ſhall be *extinguiſhed* or *ſuſpended* by the Purchaſe of Part of the Land; or by taking a Leaſe for a ſhorter Term than the Tenant has; may more regularly be digeſted under the Conſideration of *Apportionment* of Rents: and therefore we ſhall conſider the *Apportionment* of Rents under the following Diviſion:

1ſt, In what Caſes a Rent may be apportioned by the Act of the *Party*, and herein of the Difference between a Rent *Service*, and a Rent *Charge*.

2dly, In what Caſes a Rent may be apportioned by the Act of *Law*, or Act of *God*.

3dly, The *Manner* of ſuch Apportionment, and how the Tenant ſhall take Advantage of it.

And here firſt, we muſt diſtinguiſh between a Rent *Service*, and a Rent *Charge*. For if a Man who has a Rent *Service* purchaſes Part of the Land out of

A. having a Rent Service purchaſes Part of the Land, the Rent ſhall be apportioned. Lit. Sect. 222.

of which the Rent iſſues, the Rent *Service* is *not extinguiſhed*, but ſhall be apportioned according to the Value of the Land; ſo that ſuch Purchaſe is a Diſcharge to the Tenant, for ſo much of the Rent as the *Value* of the Land purchaſed amounts to.

Secus of a Rent Charge.

But if a Man has a Rent *Charge*, and purchaſes Part of the Land out of which the Rent iſſues, the *whole* Rent *is extinguiſhed*; and conſequently the Tenant is diſcharged from the Payment of it. And the Reaſon of the Difference

8 Co. 105. b. Lit. Sect. 223.

is this: In Caſe of the Rent Service, the Tenant is under the Obligation of the Oath of Fealty, to bear Faith to his Lord, and to perform the Services for the Land which he holds of him; and this Obligation has its Force, while the Tenure of the Lord continues; and the Tenure could not be diſcharged by Purchaſe of Part of the Tenancy, for that conſtruction would not only be attended with this Abſurdity, that the remaining Part in the Tenant's Hands would be held of nobody; but in Conſequence would produce this publick Inconveniency, that the Remainder of the

the Tenancy would be free of all Feudal Duties, which in the Height of the Feudal Tenures, muſt have been a Detriment to the Public: wherefore, ſince for this Reaſon, the Tenure between the Lord and Tenant continued for ſo much of the Land as remained unpurchaſed, the Tenant, by his Oath of Fealty, was obliged to perform the Services of it. — But it were unreaſonable and ſevere, to oblige him to the Performance of the whole Services that were reſerved upon the old Donation, becauſe the Lord had *wilfully* reſumed Part of the Land, which was the Conſideration upon which the Obligation to make the annual Return of Services was founded; and the *Medium* between theſe two Extremes was, that, ſince the Enjoyment of the Land was the Conſideration for the Services, the Return ought always to be made according to the Proportion of the Land which the Tenant continued in Poſſeſſion and Enjoyment of. But in the Caſe of a Rent *Charge*, when the Grantee purchaſes Parcel of the Land, the whole Rent is extinguiſhed, becauſe there is no *Feudal* Dependency between the Grantor and

and the Grantee by the Deed of Grant which created the Rent Charge, as there was by the Feudal Donation which created the Rent Service.—And therefore as theſe Grants were of no Benefit to the Publick, and afforded no Addition of Strength or Protection to the Kingdom, the Law carries them into Execution, only ſo far as the Rent could take Effect, according to the original Intention of it: and therefore, if the Grantee had *wilfully*, by his *own Act*, prevented the Operation of the Grant, according to the original Intention of it, the whole Grant was to determine. But when a Rent Charge is granted out of Land, the Rent iſſues out of every Part of the Land, and conſequently every Part of the Land is ſubject to a Diſtreſs for the whole Rent; and therefore, when the Grantee purchaſes Part of the Land, it is become impoſſible, *by his own Act*, that the Grant ſhould operate in that Manner: becauſe it is abſurd, that the Grantee ſhould diſtrain his own Lands, or bring an Aſſize againſt himſelf. And therefore ſuch Grants, after ſuch Purchaſe, have been adjudged void: And the rather,

rather, becauſe, in their original Creation, they were againſt the Reaſon and Policy of the Law; ſince they were ſo far from contributing to the Strength of the Kingdom, that they really weakened it, becauſe the *Tenant*, whoſe Land was ſubject to ſuch Charge, was the leſs able to provide himſelf for the Field, or to perform the Duties of the Feudal or Military Tenure; and the *Grantee* was under no Obligation of Attendance, on Account of the Benefit he received from ſuch Grant, and therefore ſuch Grants are ſaid in the Law Books to be againſt *Common Right*.— But in this Caſe, if the Grantor by Deed, reciting the Purchaſe, had granted; that the Grantee ſhould diſtrain for the ſame Rent in the Reſidue of the Land; the whole Rent Charge had been preſerved: becauſe ſuch Power of Diſtreſs, as is already ſhewn, had amounted to a new Grant.

Co. Lit. 147. b.

But the Law has carried the former Poſition of *Extinguiſhment* only to ſuch Caſes, where the Grantee of the Rent, *wilfully, by his own Act*, prevents the Operation of the Grant according to the

If Part of the Land deſcends to the Grantee, the Rent ſhall be apportioned, becauſe this comes by Act of Law.

Lit. Sect. 224. 2 Rol. Ab. 236.

the original Intention thereof.— For, if Part of the Lands *deſcends* to the Grantee of the Rent Charge, the Rent ſhall be *apportioned*, according to the *Value* of the Land. For the Grantee, in this Caſe, is perfectly paſſive, and concurs not, by any *Act of his*, to defeat the Intention of the Grant: and therefore the Law, which throws the Land into his Hands, that there may be immediately a Tenant to perform the Feudal Duties, apportions the Rent; leſt the Grantee ſhould be diſcouraged to take upon him the Burden of the Feud, by the Loſs of the intire Rent: And the rather, becauſe it were unreaſonable and ſevere, that the Grantee ſhould be puniſhed in his Property, without any Default, or concurring in that Act which extinguiſhes the Rent.

So if the Tenant makes a Gift in Tail to the Grantee's Father. Co. Lit. 149. b.

And for the ſame Reaſon, if the Tenant makes a Gift in Tail of Part of the Land, to the Father of the Grantee; the Deſcent of that Part, upon the Death of the Father, ſhall not *ſuſpend* the whole Rent, during the Continuance of the Intail; but the Rent ſhall be apportioned according to the Value of the Land

Land intailed. For *Res inter alia, alteri nocere non debet.*

So if the Father be Grantee of a Rent Charge, and the Son purchaſe Part of the Land; upon the Death of the Father the Rent ſhall be apportioned, according to the Value of the Land purchaſed by the Son; becauſe the Son contributes to the Tenure of the Rent of the Lands in his Hands, and the Law, by eſtabliſhing ſuch a Courſe of Deſcent, throwing the Rent upon the Son, it would be ſevere to puniſh the Son, by the Loſs and Extinguiſhment of the whole Rent, for an Act to which he contributed nothing; for that would be, to give him the Rent according to the eſtabliſhed Courſe of Deſcent, and give him no Benefit by ſuch Deſcent, but to take it away from him at the ſame Inſtant.

So if a Son purchaſes Part of the Land of which his Father has a Rent Charge upon in his Life-time. Co. Lit. 149. b.

If Land deſcends to two Coparceners in Fee, and one of them had a Rent Charge in Fee iſſuing out of ſuch Land; it ſeems, that the Rent is loſt, until *Partition* made: becauſe the Grantee is ſeiſed *per my & per tout*, that is, of the Whole

So of Coparceners in Fee, where one had a Rent Charge. Co. Lit. 150. a. 1 Rol. Ab. 236.

Whole and every Part of the Land; and conſequently cannot diſtrain his own Land for the Rent. But after Partition made, a Moiety of the Rent ſhall revive, upon the Reaſon of the former Caſes: ſince the Land was thrown upon her by the Courſe of Deſcent, without any concurrent Act of her's; and therefore, having no Intereſt in her Siſter's Moiety after *Partition*, ſhe may well diſtrain for a Moiety of the Rent which iſſues out of it.

So if the Son re-enters, or recovers, by a Writ Dum fuit infra Ætatem, Lands that his Father purchaſed and ſold within Age. Co. Lit. 150. a.

If the Father *within Age* purchaſe Part of the Land, out of which his Son has a Rent Charge, and he alieneth it *within Age*, and dieth; if the Son enters into the Land, or recovers by a Writ of *Dum fuit infra Ætatem*, in this Caſe, though the Grantee *wilfully* brings himſelf into the Poſſeſſion of the Land, yet the Rent ſhall be apportioned; becauſe the Right to the Land is by Deſcent, and without any concurrent Act of his is thrown upon him; and the Law gives a Remedy ſuitable to that Right; and it were abſurd to ſay, that the Law gives a Man a Remedy for the

the Recovery of his Right, and yet lays him under a Penalty not to profecute that Right; as the Caſe would be, if, upon the Recovery of the Land, the whole Rent, which might be of much greater Value than the Land recovered, ſhould be *extinguiſhed* and not *apportioned*.— So it is if the Grantee had recovered by a *Dum fuit non compos mentis*.

So it is if a Man ſeiſed in Fee marries, and then aliens his Land; the Alienee grants a Rent Charge of 10 *l.* *per An.* to the Huſband and Wife, and to the Heirs of the Huſband, and the Huſband dies, the Wife recovers a Moiety of the Feoffee for her Dower by the Cuſtom; tho' ſhe concurs to recover the Poſſeſſion, yet the Rent ſhall be apportioned; becauſe the Law, giving her the Remedy, ſhall not puniſh her for the Execution of it, by the Extinguiſhment of the whole Rent, which probably may be of greater Value than the Moiety of the Lands.

So it is where a Man is ſeiſed in Fee and aliens, and the Alienee grants a Rent Charge to the Huſband and Wife, and the Heirs of the Huſband, the Huſband dies; the Wife ſhall recover a Moiety for der Dower. Co. Lit. 150.

Hence it is, that if a Man grants a Rent Charge out of two Acres, and afterwards the Grantee recovers one Acre by

In this Caſe there is neither an Extinguiſhment of Rent, nor

Apportionment. Co. Lit. 148. b. Note the Diverſity.

by Title *Paramount*, the Grant of the whole Rent ſhall remain unextinguiſhed; becauſe the Law, that gives the Remedy for the Recovery of a Man's Right, will not prevent the Proſecution of ſuch Right, by depriving the Proſecutor of a greater Profit than the Thing recovered may amount to.—But in this Caſe there ſhall be *no Apportionment*, but the Grantee ſhall have the *whole* Rent, after he has recovered the one Acre: becauſe upon the Grant, each Acre is charged with the whole Rent; and, upon the Recovery, it appears, that the Grantor had no Intereſt in one Acre, and conſequently could not charge it; and therefore, the Grant being to be taken moſt ſtrongly againſt him, the *whole* Rent ſhall continue after the Recovery, becauſe the Rent was originally for ſo much, and therefore ſhall iſſue out of the Lands which he had Power to charge.—Whereas in the former Caſes, the Grantor had, at the Time of the Grant, Power to charge all the Lands; and therefore, when Part of the Land, ſubject to ſuch Charge, comes to the Grantee by Act of Law, it is reaſonable at leaſt, that the Charge ſhall be

be apportioned, when Part of the Land originally ſubject to the Charge comes to the Grantee.

So it is if a Man be ſeiſed of two Acres, one in Fee, and the other in Tail, and grants a Rent Charge in Fee out of both Acres; upon the Death of the Grantor, the whole Rent ſhall iſſue out of the Eſtate in Fee; becauſe, by the Grant, the Rent Charge was to continue for ever: But the Acre in Tail could not bear its Proportion of it *during the Life of the Grantor*; and therefore, from the plain Words of the Grant, there ſhall be no Apportionment of it: for then the Grantee would have but an Eſtate for Life in the Moiety of the Rent, when, by the expreſs Words of the Grant, he was to have an Inheritance in the whole. Co. Lit. 148.

So if *A.* enfeoffs *B.* of one Acre *upon Condition*, and *B.*, being ſeiſed of another Acre in *Fee*, grants a Rent Charge in Fee out of *both* to *A.*, and afterwards *A.* enters for the Condition broken into one Acre; the Rent is not apportioned, but the Whole iſſues out of the other Co. Lit. 148. Rent ſhall never be apportioned when the Grantee recovers by a Title Paramount.

Acre: becauſe, upon the Condition broken, *A.* is reveſted in his old Eſtate, and no Charge of *B.* can any longer affect it, for *A.* claims by a Title paramount to *B.* and the whole Charge ſhall continue, becauſe, by the Grant, *A.*, was to have an abſolute Eſtate of Inheritance in the whole Rent.

But if *A.* had made a Leaſe for Life, of the one Acre to *B. without Condition*, and *B.* had granted a Rent Charge out of both Acres to *A.*, and then *B.* had made a Feoffment of, or committed Waſte in, the Acre leaſed for Life, and *A.* had entered for the Forfeiture; in this Caſe the Rent ſhall be apportioned, becauſe he comes in under the Act of the Grantor, and derives under his Eſtate; and therefore ſhall not have both the Eſtate from the Grantor, and the Rent iſſuing out of it: whereas in all the former Caſes the Rent ſhall not be apportioned, becauſe the Grantor claims by a *Title paramount* to the Grant of the Rent, and ſo avoids the Charge *ab initio*. Yet, in this Caſe, though the Grantee comes under the Eſtate of the Grantor, the Rent ſhall not be extinguiſhed,

guiſhed, as it would be if the Grantee had derived by Purchaſe from the Grantor; becauſe the Waſte, and the Feoffment of the Tenant for Life, were unlawful Acts in themſelves, and it were to encourage ſuch Injuries and Wrongs, to ſuffer the Perſon that commits them to receive any Advantage or Benefit from them; as *B.* in this Caſe would, if upon *A.*'s Entry for the Forfeiture the whole Rent had been extinguiſhed.

A Rent Charge may be apportioned by the Act of the Party, as by releaſing Part to the Tenant, or to a Stranger if the Tenant attorns. Co. Lit. 148. a. Cro. Eliz. 742. ſeems con'.

And in ſome Caſes a Rent Charge may be apportioned by the *Act of the Party.*—As if the Grantee *releaſes* Part of his Rent to the Tenant of the Land, ſuch Releaſe does not extinguiſh the whole Rent.—So, if the Grantee gives Part of it to a Stranger, and the Tenant attorns; ſuch Grant ſhall not extinguiſh the Reſidue which the Grantee never parted with: becauſe ſuch Releaſe or Diſpoſition makes no Alteration in the original Grant, nor defeats the Intention of it, as the Purchaſe of Part of the Land does; for the whole Rent is ſtill iſſuable out of the whole Land, and laid according to the original Intention of the Grant.—Beſides, ſince the

Law allowed of ſuch Sorts of Grants, and thereby eſtabliſhed ſuch Sort of Property, it would have been unreaſonable and ſevere, to hinder the Proprietor from making a proper Diſtribution of it, for the Promotion of his Children, or to provide for the Contingencies of his Family, which were in his View.

The Objection that has been made againſt theſe Sorts of Appointments of Diviſion of Rent Charges is this, that the Tenant thereby would be expoſed to ſeveral Suits and Diſtreſſes for a Thing which, in its original Creation, was intire, and recoverable upon one Avowry. But the Anſwer to this is obvious; that it is in the Tenant's Choice, whether he will ſubmit himſelf to that Inconveniency, (if it may be ſo called,) becauſe the Grantee can make no Benefit of the Grant by *Diſtreſs*, without Conſent or Attornment of the Tenant; nor by Aſſize, without obtaining Seiſin of it from the Tenant; and therefore there can be no Objection from the Tenant to what himſelf has conſented to and approved of.

And

And if a Rent Charge may be partly aſſigned by the Grant of the Party, much more may Part of it be *extended* for his Debts, by the Favour and Aſſiſtance of the Law; for tho' the Tenant is thereby, without his Attornment, poſſibly made liable to ſeveral Suits and Diſtreſſes, yet it is an Inconveniency he may avoid by a punctual Performance of his own Grant.

Part of a Rent Charge may be extended. Cro. Eliz. 742. Worton v. Shirt.

But here it is further inquirable, in what Caſes a *Rent Service* ſhall be apportioned, and that by either Act of Law, or Act of the Tenant. We have already obſerved, that, if the Lord purchaſe Part of the Tenancy, the Services ſhall be apportioned.—But here we muſt diſtinguiſh between Services *diviſible* in there Nature, as Rent; And ſuch as are *indiviſible*, as a Horſe, a Hawk, *&c.*: for in the laſt Caſe, if the Lord purchaſe Part of the Tenancy, there can be no Apportionment of the Service from the Nature of the Thing, and therefore ſuch Service is *extinct*, and the Tenant diſcharged from the Payment of it; for the whole Tenancy being equally chargeable with the Payment

Services indiviſible in their own Nature, where the Lord purchaſes Part of the Tenancy, the Services are extinct. 6 Co. 1. b. Buerton's Caſe. Co. Lit. 149. a. 8 Co. 155. a. Moor 203.

ment of ſuch Services, the Lord, *by his own Act*, ſhall not diſcharge Part, and throw the whole Burden upon the Reſidue, for his own private Benefit and Advantage.

6 Co. 1. 2. Co. Lit. 149. a. But if ſuch intire Service were for the Benefit of the Publick, as *Knights Service*, and *Caſtle Guard*, for the Defence of the Realm, or the Adminiſtration of Juſtice; — or if ſuch intire Service was a Work of *Charity* or *Piety*; — in all ſuch Caſes, the Tenant is ſtill chargeable with the whole Service: for there can be no *Apportionment*, becauſe the Thing in its Nature is indiviſible; and the whole ſhall not be *extinguiſhed*, becauſe the Public has an Intereſt in ſuch Services, and therefore ſhall not be prejudiced by the private Tranſactions of the Parties.

Co. Lit. 149. Lit. Sect. 223. Yet if the Tenure be by *Knights Service*, tho' for the former Reaſon it ſhall not be apportioned, yet, if *Eſcuage* be aſſeſſed on the Tenant for not attending his Lord in the Field, ſuch Eſcuage being only a Penalty, or a Sum of Money, due to the Lord for Non-attendance, ſhall be apportioned; and

and the Tenant ſhall only be obliged to pay his Proportion of it, according to the Value of the Lands remaining in his Hands after the Purchaſe; becauſe now it is become a private Emolument to the Lord, in which the Public has no Share.

But where the Tenure is by a Service in its Nature *indiviſible*, as by a Horſe, or a Hawk, *&c.*, which are only for the private Benefit or Pleaſure of the Lord; yet if Part of the Tenancy comes to the Lord by *Deſcent*, the Service is not extinguiſhed: becauſe here is no Conſent or Concurrence of the Lord to the Diviſion of the Tenancy, but the Tenant has multiplied the Services by his Feoffment, as hereafter ſhall be ſhown; and the Father of the Lord, who is the Feoffee, as well as the Feoffor, holds under the Feoffment of the Tenant by the Service of an Horſe or an Hawk, and therefore when the Father dies, and that Part of the Tenancy which he claimed by the Feoffment of the Tenant thereby devolves upon the Lord by the eſtabliſhed Rule of Deſcent, ſuch Deſcent can only ex- Co. Lit. 149.

tinguiſh the Service which was paid to the Lord for the Land deſcended, but can make no Charge or Alteration in the Service by which the Tenant held after his own Feoffment.

F. N. B. 159. b. 6 Co. 1. Co. Lit. 149. a. 2 Inſt. : 20. Plow. 240. b.

There is one Exception to the Reaſon of this laſt Caſe, and that is by the Statute of *Marlebridge*, Chap. 10. which provides, "*quod ſi plures Feoffati fuerint de hæreditate de qua communia ſecta debeatur, Dominus unicam ſectam habeat:*" and therefore put the Caſe, there be Lord and Tenant by Homage, Fealty, and Suit of Court, and the Tenant aliens ſeveral Parts of his Tenancy to ſeveral Men; the Suit of Court is not multiplied by ſuch ſeveral Alienations; for the Statute ſays, "*Dominus unicam ſectam habeat:*" and therefore, every Feoffee being obliged to the Performance of that Suit, whoever performs it to the Lord, ſhall have Contribution of the reſt. But if the Father of the Lord were one of the Feoffees, and he dies, whereby his Intereſt deſcends to the Lord, the whole Suit is loſt, and the Tenants abſolved from the Performance of it; becauſe

becauſe they can have no Contribution from the Lord: for that in Effect were to make the Lord do Suit to himſelf.

But in all Caſes, whether Part of the Tenancy comes to the Lord by Purchaſe, or by Deſcent, the *Homage*, and *Fealty* are ſtill due to the Lord for the Remainder of the Tenancy; becauſe by thoſe, the Tenant undertakes to bear Faith and Homage to his Lord for all the Lands that he holds of him: and therefore, while there is any Tenure of the Lord, the Obligation ariſing from ſuch Engagement muſt continue, and conſequently the Tenant is not abſolved from them by the Lord's Purchaſe of Part of the Lands, ſince the Tenant ſtill holds the Reſidue of the Lands.

Lit. Sect. 223. 6 Co. 1. Co. Lit. 149. 8 Co. 105. b.

And hence by the Way it is, that, if the Tenant aliens Part of the Land, the Services of Homage and Fealty *multiply* to the Lord, that is, the Feoffor is not abſolved from the Obligation of them, becauſe he originally performed them for every Part of the Land which he held from the Lord; and therefore, while

while any Part remains in his Hands, the Obligation to the Performance of them continues. And ſince the Statute of *Quia Emptores &c.* the Feoffee muſt hold of the ſame Lord. But theſe Services are in their Nature indiviſible, and therefore the Conſtruction upon the Act, has been, that the Services ſhould *multiply* to the Lord, becauſe otherwiſe Part of the Land had been drawn out of his Homage without his Conſent, and ſuch Part muſt be held of nobody, becauſe whoever holds of any Lord muſt at leaſt engage himſelf by the Oath of Fealty, to be faithful to his Lord for the Lands that he holds of him.

So if the Tenure had been by Homage, Fealty, and a Horſe, Hawk, or Spur; if the Tenant aliens Part, the Services ſhall multiply, and both Feoffor and Feoffee ſhall each of them pay a Horſe, Hawk, or Spur, to the Lord.

Corporal Services ſhall not multiply.
8 Co. 105. b.

—But if the Tenure had been by any *corporal* Service, as to be Butler to the Lord; Steward or Bailiff of his Manor; or to cover, or repair his Houſe; or to reap or threſh his Corn; in all theſe Caſes,

Caſes, upon Alienation of Part, ſuch perſonal Services ſhall not multiply.

If there be Lord and Tenant by Fealty and Heriot Service, and the Tenant aliens Part of the Tenancy, the Alienee ſhall hold by a diſtinct Heriot Service, for the Services ſhall multiply for the former Reaſon. — And if, after ſuch Alienation, the Lord purchaſes the Reſidue of the Tenancy, only the Heriot Service due from the firſt Tenant ſhall be extinguiſhed; becauſe by the Alienation, each held his Proportion, by a ſeparate and diſtinct Tenure; and therefore, if the Lord purchaſes one Tenancy, that can no Way affect the Services of his other Tenants: but if the Lord, before the Tenancy had been ſeparated and held by two diſtinct Tenures, purchaſed Part of it, the whole Heriot Service had been extinct, for the Reaſon already given, for the Extinguiſhment of a Rent Service which is not in its Nature to be divided.

2 Co. 104. b. 105, 106. Talbot's Caſe. Co. Lit. 149.

But if the Heriot was due by the Cuſtom of the Manor, that upon the Death of every Tenant of the Manor

8 Co. 106. 2 Brounl. 206.

the Lord ſhould have a Heriot; here, if the Lord purchaſes Part of the Tenancy, it ſhall not extinguiſh the Cuſtom; becauſe the Lord has purchaſed only Part, and the Tenant, on Account of the Reſidue, is ſtill within the Lord's Homage, and Tenant of his Manor; and conſequently, upon his Death, as upon the Death of every other Tenant of the Manor, the Lord is intitled to the Heriot.

In the next Place it is to be conſidered, whether a Rent Service, *incident* to the *Reverſion*, may be *apportioned* by the Grant of *Part* of the *Reverſion*.

Inſt. 504. 1 Rol. Ab. 2345. Cro. 851. Weſt. v. Laſſel. Co. Lit. 148. a. 8 Co. 79. b. Cro. Eliz. 651. Dy. 386. Hob. 177.

It ſeems formerly to have been doubted, whether upon ſuch Grant there could be any Apportionment, or whether the whole Rent ſhould not be extinguiſhed and loſt; for ſince the Reverſion and Rent incident thereto were intire in their Creation, they thought it hard, that by the Act of the Leſſor they ſhould be divided, and thereby the Tenant made liable to ſeveral Actions and Diſtreſſes for the Recovery of them.

But

But this Conception was too narrow and abſurd to govern Mens Property long: for if I make a Leaſe of three Acres, reſerving 3 *s.* Rent, as I may diſpoſe of the whole Reverſion, ſo may I alſo of any Part of it, ſince it is a Thing in its Nature ſeverable; and the Rent, as incident to the Reverſion, may be divided too, becauſe that, being made in Retribution for the Land, ought, from the Nature of it, to be paid to thoſe who are to have the Land upon the Expiration of the Leaſe. And hence it is, that the Rent paſſes immediately with the Reverſion, without any expreſs Mention of it in the Grant. But the Tenant has really no Prejudice from ſuch Grant, becauſe it is in his Power, and it is his Duty, to prevent the ſeveral Suits and Diſtreſſes, by a punctual Payment of the Rent; and therefore he ought not to complain of a Miſchief, which he has wilfully brought upon himſelf. Beſides, formerly ſuch Grants could not take Effect without the Attornment of the Tenant. But, on the other Hand, it would be extremely prejudicial, if, upon ſuch Grants, the Rent ſhould not be apportioned; becauſe then

A Reverſion may be diſpoſed of in Part, and the Rent, as incident to it, ſhall be divided.

A Rent paſſeth without any Mention of it in the Deed with the Reverſion.

the Leſſor could not out of his Property make a Proviſion for his younger Children, or anſwer the Contingencies of his Family which are in View.

Rent may be apportioned by a Deviſe. Cro. Eliz. 637, 651. 2 Rol. Ab. 237.

And upon this Reaſon, the Apportionment of Rents has been carried a Step farther.—As if *A.* poſſeſſed of a Term for 20 Years, leaſes it for 10 Years, reſerving 30 *l.* Rent; and afterwards *A.* deviſeth 20 *l.* of the Rent to three of his Sons, equally to be divided: this is a good Deviſe, and each of the Sons ſhall have an Action of Debt for his third Part, though the Reverſion, to which the Rent originally was incident, remains intire; for there is nothing in the Nature of the Thing to hinder ſuch a Diviſion or Apportionment: and, if the Tenant omits to pay the Rent, the ſeveral Actions are Miſchiefs which he brought upon himſelf, and which he might, and ought, to have prevented.

Cro. Eliz. 851. Weſt v. Laſſelly. 2 Rol. Ab. 234.

If the King's Tenant leaſes for Years, and grants the Reverſion of two Parts, and dies, being in *Ward* for the third Part which deſcended; if the King grants

grants the third Part over, the Grantee ſhall have an Action of Debt for the third Part of the Rent; becauſe by the Grant in the Tenant's Life-time of two Parts the Rent was apportioned, and the third part of the Rent was not extinguiſhed, but incident and attending that Part of the Reverſion which deſcended; and therefore the Grantee, that has the Part of the Reverſion, has a Right to the Rent incident to it.

If a Man makes a Leaſe for Years of Land, and a Stock of Sheep,—or leaſes a Houſe with the Furniture in it,—reſerving Rent, and afterwards enters the Premiſſes, and makes a Feoffment; if the Leſſee re-enters, the Feoffee is intitled to the whole Rent: and there ſhall be no Apportionment of it on Account of the *Furniture* or Sheep; becauſe the Rent iſſued out of the Land, and the Sheep or Furniture, tho' they might be taken as Pledges, yet no Rent can be reſerved out of the Uſe of them, becauſe nothing can yield a Rent, that the Leſſor cannot at any Time have a Recourſe to for a Diſtreſs: but theſe Things may be moved or driven from the

Dy. 212. b. Bendl. pl. 127. Cro. Eliz. 256.

Nota. Nothing can yield a Rent, that the Leſſor cannot have Recourſe to for a Diſtreſs.

the Premiſſes, and ſo taken out of the Diſtreſs of the Leſſor: wherefore in this Caſe, ſince the Leſſor by the Feoffment has conveyed his whole Eſtate, the Reverſion, and Rent incident thereto, after the Re-entry of the Leſſee, is in the Feoffee. So, and for the ſame Reaſon, if the Land had been evicted by Title Paramount, there ſhall be no Apportionment of the Rent on Account of the Goods, but the Leſſee, it ſeems, in this Caſe, ſhall enjoy them during the Term, without paying any Rent.

So it is, if *A.*, ſeiſed in Fee of one Acre, and poſſeſſed of a Term of Years in another Acre, grants a Rent out of *both* to *B.* in Fee; and takes a Leaſe or Grant of the Leaſehold; here the Rent ſhall not be thereby ſuſpended; for tho' that Acre was ſubject to a Diſtreſs for Non-payment, yet the Term for Years being but a Chattel, is an improper Fund for a Freehold Rent to iſſue out of: for, if that Conſtruction were admitted, the Grant, which was in its Creation uniform, muſt in Conſequence be broken and divided; and Part of the Rent muſt determine upon the Expiration

ration of the Term, while the other Part, that iſſued out of the Inheritance, muſt, according to the Deſign of the Grant, be payable for ever: wherefore, in ſuch Caſes, to preſerve the Grant uniform, according to the original Intention of it, the Rent is taken to iſſue out of the Fee-ſimple only; and conſequently a Purchaſe, or taking a Leaſe of the Leaſehold Acre, ſhall not extinguiſh or ſuſpend the Rent.

If Leſſee for Life or Years ſurrenders Part, or if he commit a Forfeiture of Part, by making a Feoffment or doing Waſte, the Rent ſhall be apportioned; becauſe the Rent is a Retribution for the Land, and therefore muſt neceſſarily ceaſe, according to the Proportion of the Land reſumed by the Leſſor: for it were abſurd, that the Leſſor ſhould have both the Land, and the Retribution for it: but the whole Rent is not extinguiſhed, becauſe, from the Nature of the Contract, the Rent is to be paid in Conſideration of the Enjoyment of the Land; and therefore the Tenant ſhall be obliged to pay the Rent in Proportion to the Land he enjoys.

A tortious Entry by the Leſſor upon any Part of the Land, is a Suſpenſion of the Rent until the Leſſee be reſtored to the Poſſeſſion.
Co. Lit. 148. b.
Bro. Tit. Extin. 43.
1 Rol. Ab. 938.
4 Co. 52. b.
9 Co. 135. a.
Pollex. 142, 144.

But if the Leſſor takes a Leaſe of *Part* of the Land, or enters *wrongfully* into Part; there are Variety of Opinions, whether the *intire* Rent ſhall not be *ſuſpended* during the Continuance of ſuch Leaſe or tortious Entry. Some have held, that there ſhall be no Apportionment in either Caſe, but that the whole ſhould be ſuſpended; for this Reaſon I ſuppoſe, becauſe, by the Demiſe, every Part of the Land was equally chargeable with the whole Rent; and therefore, the Leſſor ſhall not, by his own Act, diſcharge any Part from the Burden, during the Continuance of ſuch Contract. This indeed may be a good Reaſon, why the whole Rent Service ſhall be ſuſpended, if the Lord or Leſſor *diſſeiſes* or *ouſts* his Tenant or Leſſee of any Part of the Land; becauſe this is a *wrongful Act*, to which the Tenant conſented not: and if it were not attended with a total Suſpenſion of the Rent, until he makes Reſtitution of the Land, it would be in the Power of the Lord or Leſſor to reſume any Part of the Land againſt his own Engagement and Contract; and ſo, by taking

that which lies moſt commodious for the Tenant, render the Remainder in Effect uſeleſs, or put him to Expence and Trouble to reſtore himſelf to ſuch Part by Courſe of Law. Therefore, to prevent theſe Inconveniencies, and that no Man might be encouraged to injure or diſturb his Tenant in his Poſſeſſion, when, by the Policy of the Feudal Law, he ought to protect him and defend him; theſe Reſolutions have been: and ſo the Law is at this Day, that ſuch *Diſſeiſin* or *tortious Entry* ſuſpends the whole Rent, and the Leſſee or Tenant is diſcharged from the Payment of any Part of it, till he be reſtored to the whole Poſſeſſion.

But there is no Colour or Reaſon why the whole Rent ſhould be ſuſpended, when the Lord or Leſſor *takes a Leaſe* of Part of the Land; becauſe here is the Concurrence of the Tenant, who, by his own Act and Conſent, parts with ſo much of the Land as is re-demiſed, and thereby ſuperſedes the former Contract as to ſuch Part. But ſince the Obligation to pay the Rent, was, by the firſt Contract, founded upon

Vent. 277. Co. Lit. 148. b. 9 Co. 135. a.

The Tenant making a Redemiſe of Part of the Land to the Leſſor, the

Rent ſhall be apportioned. Pollex. 141, 145. 1 Vent. 176, 7. 2 Lev. 143. 3 Keb. 500. 1 Rol. Ab. 938. Dorrel v. Andrews.

upon the Conſideration of the Tenant's enjoying the Land; that Obligation muſt ſtill continue on the Tenant, ſo far as it is not cancelled or revoked by any ſubſequent Contract between the Parties: and conſequently, the whole Rent ſhall not be extinguiſhed by ſuch Re-demiſe, but the Tenant ſhall pay Rent in Proportion to the Land he enjoys; becauſe the Obligation of the firſt Contract muſt ſubſiſt ſo far as the Tenant enjoys the Conſideration which firſt engaged him in ſuch Obligation.

If a Rent be reſerved on ſuch Re-demiſe, no Part of the Rent, reſerved on the firſt Contract, ſhall be ſuſpended. 1 Vent. 276.

And by the Opinion of the *Lord Chief Juſtice Hale*, if the Tenant, upon ſuch Re-demiſe, reſerved a Rent, no Part of the Rent reſerved upon the *firſt* Contract ſhall be ſuſpended: for the Reaſon, why Part of the Rent ſhall be ſuſpended where there is no Reſervation on the Re-demiſe, is, becauſe the Tenant ſhall be obliged to make Return of Rent, ſo far as he has a Conſideration for it: and therefore, when he parts with Part of the Land to the Leſſor, *without Reſervation*, he wants Part of the Conſideration upon which the Obligation to pay the whole Rent

was

was founded: wherefore the Obligation for ſo much loſes its Force. But where ſuch Re-demiſe is made, *with a Reſervation* of Rent, there the Tenant himſelf has ſubſtituted a Conſideration, in the Place of the Land which was the original Conſideration for the Payment of the intire Rent, ſo that the old Contract may be preſerved uniform and intire, and continue in its full Force: and therefore he is not intitled to the Abatement which the Law would give him, ſince he, by the Reſervation, has aſcertained it himſelf.

If the Leſſee ſets Part to a Stranger, without reſerving Rent, and the Stranger aſſigns his Intereſt to the Leſſor, the Rent ſhall neither be ſuſpended or apportioned.
1 Vent. 276.
Co. Lit. 148. b.
9 Co. 135. a.
1 Rol. Rep. 939.

If the Tenant in this Caſe had leaſed to a Stranger, *Part*, without reſerving any Rent, and the Stranger aſſigned his Intereſt to the Leſſor, there ſhould be no *Apportionment* or *Suſpenſion* of any Part of the Rent: becauſe here, the Tenant, by leaſing Part, had made himſelf anſwerable for the whole Rent; and the Leſſor, claiming under a Stranger, is intitled to the full Benefit of his Contract.

If there be Lord and Tenant by Knights Service, and the Tenant dies, his

V. le caſes ſupra.

his Heir within Age; and the Lord ſeiſes his Ward, and enters into the Land; this ſuſpends the Seigniory during the Minority of the Infant: becauſe, in the Infancy of the Ward, the Lord has the intire Profits of the Land, and conſequently, during ſuch Perception of the Profits, there can be no Tenant to anſwer the Seigniory; for it were abſurd, that the Lord ſhould be accountable to himſelf for his own Seigniory, becauſe that were to make him both Lord and Tenant, at the ſame Time, of the ſame Lands.

9 Co. 135. Co. Lit. 148. b. But if the Wife recovers the third Part of the Tenancy for her Dower, the Seigniory for ſo much is revived: becauſe the Lord has no longer the Perception of the Profits of that third Part; and the Wife takes it under the ſame Services the Huſband held it, and conſequently muſt perform them, in Proportion to the Value of the Land of which ſhe is endowed.

9 Co. 135. b. So if the Tenant dies, leaving two Daughters, one an Infant, and the other of full Age; and the Lord ſeiſes the Ward:

Ward: his Seigniory is ſuſpended but for a Moiety; for the Daughter of full Age, ſhall be ſo far obliged to anſwer the Seigniory, as ſhe enjoys the Condition upon which the Tenant's Obligation to perform the whole was founded.

If there be two Joint-tenants, or Coparceners of a Seigniory, and one diſſeiſes the Tenant, this ſhall ſuſpend but a Moiety of the Seigniory; for his Companion ſhall not be prejudiced by his injurious Act, to which he was no Party: And therefore, after ſuch Diſſeiſin, the Diſſeiſor is liable to the Diſtreſs of his Companion for his Moiety of the Seigniory. So that we ſee, where the Tenancy is *united* in the *ſame Hand* with the *Service* or *Seignory* iſſuing out of it, if that Union be but *temporary*, that is, if the Eſtate or Intereſt in both be *not* of *equal Duration*, ſuch Union makes but a temporary Diſcharge of the Service:—But if the Eſtate or Intereſt in both be of *equal Duration*, ſuch Union makes a perpetual Diſcharge of the Rent; and in that Caſe the Rent is ſaid to be *extinguiſhed:* becauſe it is abſurd, that any Man ſhould be ac- Nota.

countable to himſelf, for Services or Rent which are due to himſelf; or that he ought to have any Return of Rent, or other Service, for Land which he enjoys and takes the Profits of. And this holds as well where the Tenant takes a Leaſe of the Seigniory, or purchaſes it; as where the Lord takes a Leaſe, or purchaſes Part of the Tenancy: for, in either Caſe, there is an Union of the Land and Service in the ſame Hand, and no Man can be accountable to himſelf for any Service.

Co. Lit. 143. b. Pollex. 144. But if there be Lord and Tenant; or Lord, Meſne and Tenant; and the Lord or Meſne grants the Seigniory, or Meſnalty, to the Uſe of *himſelf*, for *Life*, Remainder to the Tenant, in Tail; this is no immediate Suſpenſion of the Rent: becauſe the Tenant has no immediate Benefit from the Grant, and there can be no Suſpenſion until the Remainder in Tail executes in Poſſeſſion; becauſe the Services are due and payable to the Tenant for Life, and he is ſufficient to anſwer the ſuperior Lord's Avowry, and the Stranger's *Præcipe*.

So

So it is if *A.* be Tenant in Tail, the Remainder to *B.* in Tail, and *A.* grants a Rent Charge to *B.* in Fee; this is a good Grant, and the Rent ſhall not be ſuſpended; becauſe the Poſſeſſion of the Land with the Perception of the Profits are in different Hands, and therefore there can be no Suſpenſion of the Rent, till the Poſſeſſion and Rent unite in the ſame Hand, by the Execution of the Remainder: and then the Rent ſhall be ſuſpended, becauſe it is abſurd, that any Man ſhould be accountable to himſelf, or chargeable with a Rent iſſuing out of his own Land. So it is if *B.* had purchaſed a Rent Charge from a Stranger iſſuing out of the Land intailed.

A. Tenant in Tail, the Remainder to *B.* in Tail; *A.* grants a Rent Charge to *B.* in Fee; the Rent ſhall not be ſuſpended, until the Remainder comes to *B.*

But in the former Caſes, if the Lord grants his Seigniory for Years, the Remainder to the Tenant for Life; or if the Meſne grants the Meſnalty to the Uſe of himſelf for Life, the Remainder to the Tenant in Fee; in both theſe Caſes, the Rent ſhall be ſuſpended.

9 Co. 134, 135.

In

In what Caſes the Rent ſhall be apportioned by the Act of *God*, or *Law*.

And in this Place we are to conſider, whether the Tenant ſhall pay the *whole* Rent, tho' Part of the Thing demiſed be loſt and of no Profit to him; or tho' the Uſe of the Whole be for ſome Time intercepted, or taken away, without his Default. —And here it ſeems extremely reaſonable, that if the Uſe of a Thing be intirely loſt, or taken from the Tenant, the Rent ought to be abated or apportioned; becauſe the Title of the Rent is founded on this Preſumption, that the Tenant enjoys the Thing during the Contract: and therefore, if Part of the Land be ſurrounded or covered by the Sea, this being the Act of God, the Tenant ſhall not ſuffer by it; becauſe the Tenant, without his Default, wants the Enjoyment of Part of the Thing which was the Conſideration of his paying the Rent; nor has the Leſſor Reaſon to complain, becauſe, if the Land had been in his own

1 Rol. Ab. 236.

own Hand, he muſt have loſt the Profit of ſo much as the Sea had covered.

But if Part of the Land be burned with *Wild-fire*, that ſhall make no Abatement or Apportionment of the Rent: becauſe the Uſe of the Land is not thereby taken away or interrupted; it may indeed, be thereby rendered leſs profitable; but that ſeems to be a common Accident, that Land ſhall yield more one Year than another; and it ſeems, that the Land in this Caſe may be reſtored in a great Meaſure to its Fertility, by the Care and Induſtry of the Tenant. Dy. 56. a. 1 Rol. Ab. 236.

If a Leaſe be made of Land with a Stock of Sheep, and all the Sheep die; it ſeems doubtful, whether the Rent ſhall be apportioned, or the Leſſee be obliged to pay the whole Rent: for though it may well be preſumed, that the Rent was advanced upon the Account of the Profits which ariſe from the Sheep, *&c.*; yet, ſince the Rent is taken to be iſſuing only out of the Land, becauſe that, being in its Nature unmovable,

unmovable, is ſtill ſubject to the Diſtreſs, which the Sheep are not *longer* than they are on the Land; it may be doubted, whether the Rent ſhall be abated, while the Tenant enjoys all the Land out of which the Rent iſſues. *Quære.*

1 Rol. Ab. 239. If *A.*, ſeiſed of one Acre in Fee, and poſſeſſed of another Acre for Years, makes a Leaſe of both, reſerving Rent, and dies; the Rent ſhall be apportioned with the Reverſion, and the *Heir* and *Executor* ſhall have each his Proportion.

Ib. Cambell's Caſe. If a Moiety of a Reverſion be extended by *Elegit*, the Rent ſhall be apportioned; and the Leſſor ſhall ſtill enjoy half the Rent, as incident to the Reverſion that remains in him.

So if a Huſband leaſes for Years, reſerving Rent, and dies; the Wife having a third Part of the Reverſion for her Dower, ſhe ſhall have the ſame Proportion of the Rent. For in all theſe Caſes, the Law diſtributes the Rent, as it diſpoſes of the Reverſion; ſince the Rent is the Retribution which the

the Tenant makes, to thoſe who are intitled to the Perception of the Profits of the Land itſelf, if the Leaſe were expired.

The Manner of *making Apportionment.*

And this is properly the Buſineſs of a *Jury*, who, upon the Evidence offered, are to judge of the Value of the Lands purchaſed by the Lord or Leſſor; or aliened by the Tenant, according to the Statute of *Quia Emptores &c.*, from whence it is for them to compute, how much is due from the Tenant for the Reſidue of the Lands in his Hands. 1 Vent. 276. 1 Rol. Ab. 237.

This may be done by a Plea of *Nil debet* pleaded by the Tenant; becauſe, when Iſſue is joined on ſuch Plea, it is the Buſineſs of the *Jury* to determine, whether any thing, and how much, is due; and this is done with regard to the *real Value* of the Land remaining in his Hands, and not with Regard to the Quantity of it.—Note, the Tenant may ſet forth the Value of the Land purchaſed by the Leſſor in his Pleading, and 1 Vent. 276.

and conclude, that the Rent ought to be apportioned.

Rent cannot be apportioned upon a Demurrer.

But the Rent cannot be apportioned upon a *Demurrer*; becauſe the Judges only determine what is Law in ſuch Caſe, but the Value of the Land never comes in Queſtion. As if an Action of Debt be brought for Rent, and the Defendant pleads, that the Plaintiff entered Part; the Plaintiff replies, that he ought not to be foreclоſed of his Action, for that the Defendant had let that Part to *J.*, and therefore did not enter: now in this Caſe there could be no Apportionment; becauſe the only Point to be determined by the Court was, whether the Plaintiff, claiming Part under the Demiſe made by the Defendant to *J.*, and the Plaintiff entering into that Part under that Title, had ſuſpended the whole Rent; and when that was determined for the Plaintiff, he muſt have Judgment for the whole Demand.

If there be Lord and Tenant by Fealty, and 20 *s.* Rent, for 20 Acres, and

and the Lord purchaſes two Acres, and then diſtrains for 18 *s.* Rent; ſuppoſing the Rent to be apportioned, according to the Quantity of the Land; the Tenant reſcues, and the Lord brings his Aſſize, and the Tenant pleads *Nul Tort*: The Recognitors of the Aſſize ſhall extend the Land according to the real Value; for the Jury, upon View of the Land, are capable of judging of the Value of each Acre; and therefore, if they find the two Acres aliened of better Value than the Rent, they may apportion the Rent accordingly, and give the Lord but 16 *s.* for the remaining 18 Acres: and tho' the Lord demanded more than his Due, yet he ſhall have no more than in Juſtice he ought to have; becauſe it were unreaſonable to expect the Lord ſhould exactly judge of the Value of the Land, and conſequently too ſevere, to put the Tenant to the Expence of a freſh Suit for ſuch Miſtake.

2 Inſt. 503. 1 Rol. Ab. 237.

But in this Caſe, if the Lord demand leſs than his Due, he ſhall recover no more than what he demanded: becauſe

cauſe the Courts muſt give Judgment correſpondent to the Right of the Demand; and that can appear no otherwiſe, but from his own ſhewing.—Beſides, if the Court gave Judgment for more than was demanded; their Judgment would be erroneous, having no Foundation to ſupport it, becauſe they would give Judgment for a Thing not judicially before them.

FINIS.

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WRIT. See *Aſſize*, *Annuity*, *Ceſſavit*, *Detinue*, *Diſſeiſin*, *Replevin*.